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The State in a wide perception: Analysis and critics

Brigitte Ondova
University of Latvia

Abstract: In relation to recognition and the idea that it is a free and voluntary act, there is the idea that there is no duty to recognize the new State. But an attempt has been made to elaborate a principle of non-recognition in those cases in which the emergence of a new State is identified with the violation of norms of D° I, such as the violation of the principle of recourse to force, that of non-intervention or that of self-determination of peoples.
On the other hand, recognition is usually unconditional. What is happening is that recently in the field, in relation to the new republics that emerged from the former Yugoslavia and the former USSR, it has tried to decouple the recognition of these new republics from respect for principles such as democratic principles, respect for human rights, minorities or established borders, ...

This practice was expressed in a declaration of 16 December 1991 by the EC EPA Ministers. However, this practice is not widespread and this series of four conditions does not affect its international personality, that is, these new republics have arisen from the moment in which the four elements have been verified, so they are rather obligations imposed on the government of these new republics.

The way to carry out the recognition can be: express or tacit, and individual or collective:

The most common form is the individual and express recognition that is usually made through a diplomatic note. Ex: case of Spain and Israel. He can also be tacit simply by establishing diplomatic relations with him.

A final question linked to recognition and admission to an IO. When a State joins an IO as a member, does that membership mean that all IO States recognize that new member as a State? This recognition is a free and voluntary act, and therefore only the States that have voted in favor of the entry of the new member will be implicitly recognizing it, but that recognition does not reach those who have voted against or have abstained.

Keywords: State, political structure, social organization

Introduction

When talking about types of State we are going to refer above all to its internal political organization that although it does not affect the D° I, in some cases it will have a series of international implications. In the case of centralized unitary states, political organization poses no problem because the internal distribution of power is centralized.

This does not happen with States with a complex structure such as federal, autonomous, regional States, ... that is, in which the distribution of power in the internal sphere is not unique, but there are territorial entities with political independence within them.

There is another series of figures with a more residual character today, such as the unions of States or the so-called independent States.

States with complex structures raise certain questions from D° I:

- Normally it is the central State that has competence in matters of RRII but it is also the State as such (central) that has legal-international personality since historically, sub-State entities lack it. So it is usually the State that will have the capacity to conclude international treaties, establish diplomatic relations with other States and the only one with the capacity to be legally responsible.
- It is normal for these sub-State entities to have certain competences connected with D° I, such as those related to maritime spaces, in fisheries, in relation to the application in the internal sphere of international standards and in some cases they will establish a federal clause in such a way that when an international treaty is concluded at the time of giving consent, It could not be lent until it had the approval of sub-State entities.

In the case of Spain, this possibility is excluded by virtue of Art.194.1.3 EC which attributes to the State exclusive competence in matters of RRII to the central State.

In the case of the Swiss cantons, it does provide for the possibility that they may conclude international treaties with other States in areas of interest limited to that canton.

In relation to Spain, Art.194.1.3 EC certainly attributes exclusive competence to the State in matters of RRII but does not exclude that the Autonomous Communities may have certain competences in matters of RRII as recognized by the TC in its judgments.

24.4. Immunity of the State and its organs

In order to speak of State immunity, it is necessary to consider the possibility for the State to be subject to the courts of another State when carrying out activities in other States. In these cases, State immunity means that it will not be subject to the courts of another State, i.e. the domestic courts of one State will not be able to try a foreign State. This idea is a consequence of the equality of the sovereignty of States.

The basis of immunity is the principle of the sovereign equality of States, unless their consent is obtained.
Immunitycanbe:

- Jurisdiction A State cannot be tried by the courts of another State.
- Enforcement That a State or its inhabitants may not be subject to enforcement measures (e.g. attachments) by the courts or administrative bodies of another State.

State immunity is not absolute, it may be waived. In addition, it does not mean impunity, in such a way that the State is obliged to respect international norms, so immunity does not exempt from international responsibility.

State immunity is mainly regulated by rules of a customary nature, derived above all from national laws and the jurisprudence of domestic courts, i.e. there is no major convention regulating this matter only within the scope of the 1972 Convention on State Immunity.

The Extent of Immunity

There are two doctrines in this respect: absolute immunity and restricted immunity.

- Absolute immunity The State may invoke immunity in any circumstances, including in civil or commercial cases. It is a position defended above all in principle by the American courts and Great Britain, and the former socialist states.
- Restricted immunity There are a number of acts in which the State will invoke immunity, usually acts of a public nature; and other cases where it will not be able to claim immunity, that is, it means a division in the acts of the State. It is a consequence above all of the intervention of the State in economic activities, insofar as the State is going to carry out certain activities as if it were a private individual, so it does not seem logical that in this case it claims immunity.

Restricted immunity is the prevailing position today. The American and English courts also ended up opting for this position because their nationals were also affected when they entered into relations with a socialist state. Thus, whether public or private activity accepted restricted immunity.

This doctrine of restricted immunity means the division of State activities into two categories: one of acts deserving of immunity and another where the State will not be able to claim immunity.

The most generalized criterion in this respect is that which distinguishes between Acts de *iureimperii*, that is, acts of the State carried out in the exercise of sovereignty within which immunity can be invoked; and Acts de *iuregestionis* where the State could not claim immunity, in which it acts as an individual.

One of the consequences of this doctrine is to establish criteria for whether or not a State can claim immunity. Now we must know when a state activity can fit into one category or another. Criteria:

- Public purpose of the act The acts that pursue public purposes would be acts of IURE IMPERII, and those that pursue private purposes would be of IURE GESTIONIS. But public administrations always pursue in their acts public ends whether they are more or less recognizable as such. Therefore, this criterion cannot be definitive.
- Naturaleza del acto Los actos de IURE IMPERII serian aquellos que solo puede realizar un Estado en uso de su soberanía, es decir, cuando nos encontremos ante un acto del poder publico no realizable por un particular.El segundo supuesto el cuando el Estado realice actos que podría realizar asimismo un particular como por ej.: cuando el Estado compre un inmueble; serian actos de IURE GESTIONIS.

Sin embargo este criterio es quizá el que más se ajusta a la distinción pero no existe un criterio definitivo por lo que va a depender de los tribunales de los Estados, ya que la inmunidad se va a aplicar por parte de los

Estados, y a juzgar por parte de los tribunales de ese Estado que debe apreciar cual es el tipo acto que ha realizado ese Estado, que serán los que determinen criterios para cada caso.

En cuanto a la práctica española es bastante escasa. Encontramos referencias en la L.O. del poder judicial, también encontramos otra disposición legal pero nada que nos aclare definitivamente cual es la posición española. Si acudimos a la jurisprudencia de los tribunales españoles podemos decir que parecen decantarse por la tesis de la inmunidad restringida.

Se ha optado por otra solución alternativa en algunos supuestos; se hace una enumeración casuística, es decir, enumerar los casos por los cuales no se va a poder alegar inmunidad, solución que parece haberse adoptado en el Convenio Europeo de la inmunidad de los Estados de 1972 que hace una enumeración de excepciones:

a) Sumisión voluntaria del Estado o la renuncia formal, es decir, el Estado decide someterse voluntariamente a los tribunales de otros Estados.
b) Actividades de naturaleza comercial o mercantil.
c) Los asuntos de carácter civil, laboral o referido a inmuebles situados en otro Estado.

Ej.: alquiler de un inmueble, despido improcedente, ...

Immunity is important because we are talking about the immunity of the State as a legal person, so we must differentiate it from the immunity that certain persons of the State may have, such as the Minister of AA.EE., the Head of State, the President of the Government, and diplomatic and consular officials; privileges and immunities that are governed by their specific rules and not by the general lines we are seeing here.

The immunity of the State will be extended both to the government and to the higher organs of the Administration. In this respect, they pose problems in intermediary bodies because they carry out activities of a public nature but also of a commercial nature, such as central banks, so it is necessary to demarcate the two types of activities.

In the case of States with a complex structure (for example, if in Spain the Autonomous Communities could claim immunity) there is no general solution but it will depend on the structure of the constitutional system of each of those States. If there has been any assumption for the Autonomous Communities, they have claimed immunity and it has been accepted.

So far we have been seeing immunity from jurisdiction but immunity is also enforcement, that is, it also extends to the possibility that the courts of another country can apply measures of application of judicial systems, and precautionary measures of suspension of a certain sentence.

This immunity from execution is much broader than that from jurisdiction because it has a greater impact on a State being dispossessed of its property or being condemned by a judgment. Therefore, even if a State waives or submits to the courts of another State, this does not mean a waiver of immunity from execution.

However, when claiming immunity from execution, it is necessary to differentiate the types of property since not all fall under the jurisdiction of the State but will depend on whether they are used to carry out public activities. Excluded:

- Property of diplomatic or consular representations or warships.
- Non-State vessels and State aircraft; It will depend on whether they are intended for the performance of public functions or of a commercial nature.

Item 25. The Dynamics of the State

25.1. Policy modifications. Recognition of Governments

It must be said at this point that alterations of a political nature, the political organization of the State is something that belongs to the internal jurisdiction of the State and does not affect in principle the DºI; Resol. 2625 it is said that *every State has the right to choose and carry out its own political, cultural, social, ...*

However, there are cases where alterations of a political nature produced irregularly, that is, against the constitutional norms of that State, will produce international effects that will be revealed through the figure of recognition of governments by which the State decides to continue maintaining or not diplomatic relations with the new government that emerged in that irregular manner.

It is precisely diplomatic relations that grant the fullness of legal relations between two States, so that the absence of diplomatic relations does not mean certain restrictions on relations between two States in addition to the publicity effects of this measure.

The recognition of governments is a free and voluntary act of the State, so that the decision will be mainly influenced by considerations of a political nature, so that today there are no requirements that a government must meet to be recognized as such so they will dominate those of a political nature and for this

reason you can not configure a legal obligation to recognize a certain government or legal obligation not to recognize you.

Although in the event of non-recognition, within some IOs, in particular the UN, it has been decided in some cases not to recognize some governments as a sanction measure for non-compliance with international obligations. Two scenarios:

- Spain in the year 46 - non-recognition by the members of the UN of the Franco government because they considered that it possessed the same nature as the Nazi and fascist governments defeated in the 2nd GM, in the line of causing its fall.
- Rhodesia - non-recognition of his government (together with the recognition of the State) on the grounds that he had acted contrary to the principle of free self-determination of peoples and because he carried out a policy of racial segregation.

In many cases, recognition of the state goes hand in hand with recognition of government because recognition of the state implicitly recognizes government. For this reason, the policy of recognition of the E.U. of recognizing the new States that emerged from the former Yugoslavia and the former USSR, imposed a series of conditions that are rather aimed at the recognition of the government of that State, since they do not affect the appearance of the international personality of the State.

It should be noted that when talking about recognition of governments, two criteria have been followed:

- Effectiveness - In the first place, some effective and stable government will be recognized, that is, one that effectively exercises state obligations regardless of the regular or irregular nature of those realities. Within this criterion we have to include the ESTRADA DOCTRINE (Ecuadorian Minister of AA.EE) that opts for the principle of effectiveness; Express recognition should be replaced by tacit recognition by the Government, derived from the fact of maintaining or withdrawing diplomatic representation.
- Legitimacy - We are talking about constitutional legitimacy; today in the DºI there is no established principle of democratic legitimacy that points out the need for all States to establish democratic regimes in their internal structure although we can see some claims such as the intervention 93-94 in Haiti of the UN.

This criterion of Legitimacy would be aimed at highlighting the regular or irregular origin of governments so that those that emerged irregularly should not be recognized, even if they were effective. It arises in the American continent where during the last two centuries, XIX and XX, it has been affected by great alterations due to politics. It has arisen with the idea of stopping these changes that occur irregularly and usually violently. We can speak of two doctrines in this regard: TOBAR and LARRETA, inspired by the criterion of legislation.

- **TOBAR -** Seeks to establish the non-recognition of those governments that emerged irregularly until it has demonstrated that they enjoy popular support manifested through the consent of a legislative assembly.
- **LARRETA -** The adoption of a collective position by the different American States is advocated in order not to recognize the governments that emerged irregularly.

They advocate different mechanisms through which to manifest their rejection.

Recognition can be express, through a manifestation of the express will of the State, or tacit deduced from the simple fact that a State decides to withdraw its diplomatic representatives from that other State.

On the other hand, a distinction has been made between de *facto* recognition and *de jure recognition*.

- De FACTO - is a recognition of a provisional nature and limited to certain legal relationships.
- De IURE - definitive or full recognition.

The new government is often recognized before it has definitively settled in the country.

25.2. Territorial modifications. Succession of States

What happens to the rights and obligations of States when a territorial alteration occurs?

- **Preceding state:** pre-existing state that may or may not disappear
- **Successor States:** The New States

Will the successor States assume the obligations of the preceding State?

The succession of States implies a territorial alteration that must occur in accordance with the DºI. Any alteration produced contrary to the principle of prohibition of the use of force is null and void. Resol. 2625 and 3314.

It has also been recognized in practice. The resol. 662 of the SC, adopted on the occasion of the Gulf War. It declared Iraq's annexation of Kuwait null and void.

As a result of the territorial alteration there will be a change in ownership over said territory, change in the State that will exercise sovereignty over that territory, therefore, there is a change in the ownership of the rights and obligations that fall on that territory.

What territorial alterations will give rise to succession issues?

- Partial succession: annexation of part of a territory of one State by another State
- Unification of States: two States uniting. Unification in twoways:
    - Merger: implies international personality of the two merging States. They disappear and a new identity emerges with new legal personality.
    - Absorption: The personality of one of the two merging States is maintained, and the other loses its own legal personality and is incorporated into the other State.
- Secession: part of the territory of a State is separated from that State and becomes a new State.
- Dismemberment: This preceding State disappears and in its territory new States are constituted that will take its place.
- States of recent independence (colonial succession): the alteration implies the access to independence of a territory that until then has been subject to colonial domination.

International Regulation

The succession of States is governed by customary rules but has been codified. Specifically in the 1978 Vienna Convention on International Treaties and the 1983 Vienna Convention on State Property, Archives and Debts (did not enter into force).

This does not prevent States from being able to envisage certain concrete and specific solutions to solve the problem of succession. The dissolution of the USSR and Yugoslavia raises new problems for the succession of states. Specifically, in the former Yugoslavia an arbitration commission was convened (it arises from a peace conference and is held in London at the beginning of the Yugoslav conflict), to know what would happen to all its rights and obligations, ... It is established:

"All the States emerging from the former Yugoslavia were successors with new legal personality. The problems of succession would be governed by the Vienna Conventions of '78 and '83"

The case of the USSR is peculiar. We must distinguish 3 assumptions:

- Baltic republics In the interwar period ('20-'40) they were states. In 1940 they were annexed to the USSR. When they regain their legal personality, they will consider themselves detached from the USSR. They will not be part of the USSR or care about its problems but there are certain succession problems that must be solved.
- Russian Federation It is the continuation of the USSR assuming most of its dºs and obligations. Especially in its membership of OI.
- Other republics that belonged to the USSR and are now independent, are now successor states of the USSR and as such, are also partly affected by problems relating to succession. These problems are wide-ranging.

A major problem is that of debts. The Russian Federation and the independent republics (except the Baltic Republics) try to resolve this through a series of agreements.

Succession of States in Respect of Treaties

The regime of State succession in the field of international treaties is governed by a fundamental principle: *Principle of clean slate*

The question is to what extent the different successor States are bound by the preceding treaties. Here the principle establishes *non-transferability*, these do not bind successor States except:

- Territorial treaties that delimit borders
- International treaties concluded in the interest of the international community

The rigorously applied principle can pose problems. What if States want to remain bound by these international treaties? Certain mechanisms are established, which may be given by granting a State a period of time to affirm those treaties by which it wishes to remain bound, and it has to affirm them expressly.

Another possibility is to allow time for the State to denounce international treaties by which it no longer wants to be bound.

Vienna Convention '78 Solution to the case of succession:

- Partial succession: In relation to a part of the territory of the State. The principle of a clean slate applies, with the exception of territorial treaties in such a way that the treaties of the preceding State will cease to apply to that parcel and the treaties will apply to the successor State (e.g. breaking off a part of the State and passing it to another / Galicia and Portugal).
- States of recent independence: The clean slate also applies with the exception of territorial treaties. But there is a special regime with reference to multilateral treaties: the successor state can make a declaration of succession saying that it does not want to continue to be bound by some of those treaties that bound the other (colonizing) state. In bilateral treaties this does not apply to the principle of a clean slate.
- Assumption of unification and separation of States: The criterion that governs is that of continuity (contrary to the clean slate). It implies that international treaties binding on the preceding State bind successor States unless the successor State, other States forming party to the treaty or the treaty itself prevent such continuity.

Assets, Archives, State Debts

In the case of State property:

They pass from the precedent to the successor and do so without compensation (the successor must not compensate the previous one because it is the successor state of property, unless otherwise stated).

Files are not regulated like goods because they have <u>two specific characteristics:</u>

(a). Indivisibility
(b). Reproducibility

The general principle is that of transfer without compensation. But it applies on a supplementary basis, in the absence of agreement between the preceding States and the successors, or between the successors (distribution). New States have the right to have information about their history and cultural heritage.

Debt Who takes charge? The Regime that regulates State debts (with other States or international subjects with reference to rights and obligations arising in the international environment. Ex: stock market shares, loans,...). The general rule is the transfer of debts from the preceding State to the successor State.

In newly independent States, debts are not transmitted (e.g., a recently independent colonized territory does not pay the debts of the colonizing State). In this case we see the USSR, how do its successors assume debts? The 12 successor states of the USSR concluded an agreement among themselves to settle this succession and the debts that it entailed. They establish a regime of joint and several liability, which means that all republics assume the entire debt. The debt is not divided into twelve parts but the republics assume the totality, this generates a disproportion (some have more assets than others eg Russian Federation).

Therefore the Russian Federation concluded agreements with each republic by which, the Russian Federation assumes all the debt of the former USSR but in return, the rest renounces any claim on the property of the former USSR in possession of the Russian Federation.

Succession of States as Members of an International Organization

Is the new successor state a member? There is no succession for these cases. The successor will have to apply for membership in the IO and meet the requirements.

Could we apply the principle of continuity to constituent international treaties? Succession to IOs constituent treaties has not been accepted. The successor state does not replace the predecessor state in IOs in general. International treaties themselves prevent the principle of continuity from governing.

Assumption = Dissolution of the USSR. The problems of succession as a member of the UN vary due to its membership in the SC. From the theoretical point of view, the new states would have to apply again for membership in the UN.

Is the post of the USSR vacant? A solution of a political nature is sought: the Russian Federation would be the continuation of the USSR occupying the position of the USSR in both the UN and the SC, while the rest of the republics have had to request again their entry into the UN.

A similar substantial entity was alleged between the USSR and the Russian Federation (population, territory, ...) something that was used to legitimize this political solution.

Item 26. Subjects of A Non-State Nature

26.1. International Organizations

It is admitted that they have their international legal personality, but that has not always been the case, even doubts were raised before the ICJ that dictates an advisory opinion in 1979 on the reparation of damages suffered in the service of the UN. The question arises: who can demand international accountability for the murder of Count Bernadot? Does the UN apply the State of which the Count was a national? If the UN could do it, then it was because it had international personality.

Subjects do not have to be equal in their nature, rights, ... IOs are created to fulfil an objective, for this purpose IOs will be assigned a series of rights and capacities to act, which can only be explained if the IO enjoys legal personality and if it is endowed with the capacity to act at the international level. If this is so, it must be recognized that IOs are subjects of DºI.

Since 49 the legal personality of the IOs is recognized. This legal personality can also be deduced from some references of the UN Charter, specifically from 2 articles:

- Art. 104. The UN shall enjoy in the territory of each Member State the legal capacity necessary for the resolution of its aims and purposes (it implies legal personality).
- Art. 105.1. The UN shall enjoy, in the territory of each of its members, privileges and immunities necessary for the accomplishment of its purposes (this is only possible if the UN is subject).

Starting from these legal bases we can consider reflecting on the legal personality of IOs.

Firstly, the statutes create the IOs and endow them with legal personality. They mean that they enjoy the rights granted to them by States by adding their legal personality. Finally, there is the functional nature of this legal personality. IOs are endowed only with those rights granted to them by States in their formation to carry out their tasks.

The scope of the legal personality of IOs is limited to the tasks and purposes they pursue. For the fulfillment of these purposes the IO will have some competences (the necessary ones). The scope of legal personality will be different in each IO, depending on its purposes (plus/minus competences). It is not like the legal personality of States, since it comes from their sovereignty.

The legal personality of IOs is manifested in the fact that IOs have their own will, i.e. they become independent of Member States, third States or other IOs.

How do you know that there is an independent will? There are a number of internal organs of the IO acting on its behalf and that IO can perform international legal acts and commit the IO (it commits the IO but not the Member States).

What are the manifestations of this legal personality?

- Capacity to conclude international treaties (with Member States, third States or other IOs).
- Ability to be internationally responsible, when committing unlawful acts.
- It may also hold internationally liable the person who has committed a wrongful act.
- It may participate in processes for the peaceful settlement of disputes.

This legal personality is manifested doubly, it is twofold:

- Outwards
- Inland: in state legal systems. It is the internal legal personality of the IOs.

An IO has no territory but has to be based in some state (e.g. UN, New York). Within the territory of each State, it is necessary that the IO has the capacity to perform legal acts such as concluding a contract.

To this end, the internal legal systems of States recognize the IO a legal capacity similar to that accorded to foreign legal persons. But it will not be equated with foreign legal persons because the IO has a series of privileges derived from its status as a subject of international law.

This is by a series of privileges that manifest themselves in two ways:

- What is the law applicable to an IO?
- Settlement of disputes

As for the applicable law, this would be either that of the State in which the OI is acting (if it acts in Spain it would be Spanish law) applying the law designated by the parties.

As for the settlement of disputes applying disputes between the IO and a particular individual, the IO will have immunity so the ordinary mode of resolution will be arbitration.

26.2. NGOs (book summary)

The fact that IOs have their origin in an international treaty concluded between States constitutes a basic differentiating element with respect to NGOs, whose legal basis turns out to be an act of DºI regardless of whether their activity is deployed at the international level.

The characteristic of some NGOs is their collaboration with various IOs of an interstate nature, often achieving consultative status with them.

Ex: NGOs that enjoy this status before the UN based on Article 71 of the Charter and Economic and Social Council Resolution 1296 of March 23, 1968.

Also those NGOs that collaborate with the same consultative status with regional IOs such as the Council of Europe.

In the latter case, the Council of Europe, through the "European Convention on the recognition of the legal personality of NGOs" of April 24, 1986, aims to recognize these organizations as having legal personality in the internal orders of the States parties, excluding the attribution of subjectivity at the international level.

The conclusion is that the general rule is that organizations not created by a pact between States do not have the status of subjects of the DºI. With the exception of those cases in which the entity in question is recognized by conventional law attributions or rights that can be exercised at the international level at the international level such as. The International Committee of the Red Cross, under the conventions of the humanitarian DºI conventions applicable to armed conflicts.

26.3. MNEA (book summary)

They are private companies of international scope constituted by internal acts. They are often denied international legal personality.

But there are authors who consider that they can have restricted and *ad hoc* personality due to the following characteristics:

- For being a hybrid between public and private in its aims and activities
- Possible association with governments to carry out mixed economic operations on the basis of agreements or contracts designating, inter alia, the DºI
- Possibility of meeting with governments before international arbitral bodies or other bodies to settle their disputes with governments (especially because of this characteristic)

For ADAM there is a group that he calls "international public *establishments*" developed with binational or multinational bases in order to provide public services under an international and general regime constituted by an *international* treaty. For some of these organizations, international subjectivity has been recognized, due to a series of factors that are:

- Independence of its regime from the national laws of the States parties to the international treaty forming the organization
- They have a number of delegated powers at the international level, including privileges and immunities similar to those of IOs.

Ex: International Payment Banking
International Finance Corporation (subsidiary of the IBRD)

26.4. The Individual

The subjectivity of the individual has not always been fully recognized. Today it is no longer possible to question it. The transformations of the DºI have made it more receptive when considering the individual as a subject of Law; But it is argued that it is only a recipient of international law, not a subject. Does the individual have legal subjectivity in the DºI, in the holder of some dºs? Can it act legally at the international level, does it have the capacity to act or respond to unlawful acts?

Legal capacity of the individual- Today the individual has a certain legal in the general DºI because the individual will be the holder of a set of rights that are directly attributed to him by the general DºI (DºI of the human Dºs). This is reflected in:

- Universal Declaration of Human Rights of 1948
- 1949 Vienna Convention on Humanitarian Law and the 1977 Protocols
- Resol 217 of the UNGA (does not have mandatory force but is recommended). In the light of its importance and its pragmatic value it has a certain obligatory value by way of the customary Dº. Thiswasdeveloped in twointernationalpacts in 1966:

- International Covenant on Civil and Political Law
- International Economic, Social and Cultural Pact

At the regional level there are different conventions:

- European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950.
- American Convention on Human Rights of 1969.

There are also specific conventions (against apartheid, discrimination against women, ...)

All this creates what is known as DºI of human Dºs. The individual is therefore the holder of these rights and the State must respect them vis-à-vis individuals.

Capacity of the individual to act
! Passive (internationally responsible)
! Active (raise international claims in defense of their rights)

Passive ! Can he be held accountable? Yes if there are crimes against the Dº de Gentes that generate criminal responsibility for the individual (genocide, piracy, war crimes, slavery, ...).
The repression of such conduct is done at the State level because there is no international jurisdiction capable of dealing with violations, everything is left in the hands of States. There are very few exceptions such as the Nuremberg Tribunal or the Tokyo Tribunal (there is no international criminal court, it is only a project).

Activate ! Can you file claims? Its capacity is very limited and except in rare cases it does not have this capacity. But there are assumptions, the Rome Convention of 1950 provides for the creation of a series of institutional mechanisms to ensure respect for the days established in that convention. Therewouldbe threeorgans:

- T.E.D.H. European Court of Human Rights
- CM. Committee of Ministers
- E.C. European Commission

They have the power to prosecute any offence but need certain requirements:
(a) that the State recognizes the TI
(b) To recognize the compulsory jurisdiction of that court

The individual can file a complaint but does not appear directly to the court, but is presented to the European Commission that filters that claim and decides whether or not it goes to trial. The individual cannot sue before the T.E.D.H. but must do so before the European Commission.

But there has been a change in Protocol 11, the structure is codified: the Committee of Ministers disappears and the Commission and the Court merge into one body, the T.E.D.H. The individual can now file lawsuits with that new T.E.D.H.

Along with this, the individual can also file lawsuits within the framework of the American Convention on Human Rights, before the Inter-American Commission on Human Rights.

Item 29: International Organizations, General Aspects

29.1. Concept and Classes

Emergence of a set of common needs or interests that cannot be resolved in a purely state framework (search for peace, development, disarmament, environment, ...). They require the establishment of mechanisms for institutionalized cooperation. This need for cooperation will give rise to IOs.

When we talk about institutionalized cooperation mechanisms, we are talking about IO compared to other mechanisms such as Conferences, which are not institutionalized. The IOs are organizations with a vocation of permanence with organs that ensure the continuity in time of the OI.

In any case, the phenomenon that after the 2nd GM leads to the appearance of IOs does not imply that the State ceases to be a primordial subject in international society. This is because IOs are going to be instruments of States, they are created by States. But the IOs are not going to be transmission belts of the State but have managed to transcend, to some extent, that role and many of the transformations of society and the DºI have been promoted by the IO (e.g. in relation to human rights).

IOs, we can say that they are voluntary associations of States established by agreements between their members and endowed with permanent bodies, responsible for pursuing the realization of objectives of common interest through cooperation among their members and capable of expressing their own legal will.

This definition serves to highlight the characteristics of IOs:

- Essentially state composition ! IOs are composed almost exclusively of States which differentiates them from other organizations such as NGOs that are associations of individuals that act on an international basis. But there are other subjects who are going to participate in OI such as some OIs who participate in others.
- Voluntary basis ! IOs are created through international treaties between States, in which States express their intention to create and participate in the IO.
- Permanent organ structure ! All IOs will have bodies that ensure the permanence and continuity of this IO. There is no model but we can speak of a tripartite structure: Representative Assembly; Bodies of restricted membership; Secretariat.
- Existence of an autonomous will ! This characteristic derives from the previous one since the system of organs will also ensure that the IO can express a different legal will from that of its member States.
- Cooperation between States ! This is the objective of IOs, for the satisfaction of common interests. It is the raison d'être of the IOs.

With these characteristics we are going to find a multiplicity of OI. After the 2nd GM and especially in the 70's there is an explosion of OI. All are different but an attempt at classification can be made according to three criteria: purposes, composition and competences.

- <u>According to thepurposes:</u>
- General purpose IOs: those that aim to promote international cooperation in all areas where possible without any limitation or excluding very specific areas. Theycanbeconstituted:

- worldwide UN
- at the regional level Council of Europe, OAS, ...

- Specific purpose IO: they try to promote cooperation in very specific areas and according to these areas we can make a classification:

- preferably military cooperation NATO
- Preferably economic cooperation IMF, OECD, WTO, ...
- preferably social, cultural and humanitarian cooperation

UNESCO, ILO
- WMO technical and scientific cooperation, Universal Postal Union, ...

- By its composition:
- IO of universal scope: are those that seek to establish the mechanisms of cooperation between all the States of the international society so they will be open to all the States of the international society.

Ex: UN (186 members).

- IO at regional level: they intend to establish cooperation mechanisms between a delimited group of States with common characteristics: geographical, economic, cultural, ... They are not open to the participation of all States but only to those that meet the characteristics of the constituent treaty.
- <u>According to theircompetences:</u>

! IO of cooperation
! Integration RO

They differ in that in integration IOs there is a transfer of sovereign competences from the Member States to the organs of the IO, compared to the IOs of cooperation whose function is limited to the harmonization of the conduct of the States.

This difference is manifested in the fact that the resolutions emanating from the integration IOs will have effects on the domestic legal systems of the States.

29.2. Powers and functions

Hablar de funciones exige hablar de la idea de función que expresa la finalidad al servicio de la cual se constituye la OI y esta idea de función es la razón de ser de la constitución de la OI. Esta idea determinada nos permite afirmar el carácter instrumental de las OI. La función en un sentido genérico es promover la cooperación entre los Estados y se verá concretada a través de fines y objetivos más concretos determinados en los tratados constitutivos. Cuanto más se concrete la idea de promoción de la cooperación, las actuaciones de las OI serán diferentes al igual que sus competencias serán también diferentes.

De esta idea de función derivan las competencias que cada OI tiene. Es por esta razón que hablamos de competencias de atribución, son aquellas competencias que las OI tienen atribuidas en los tratados constitutivos.

Sin embargo las OI no son instituciones estáticas, son dinámicas. Actúan a lo largo del tiempo y están sometidas a los cambios de la sociedad internacional pudiendo verse afectadas. Puede ocurrir que surjan nuevos fines y necesidades que no habían sido previstos en el tratado constitutivo por lo que la OI podría no tener competencias para afrontar estos hechos.

En este caso hablamos de competencias implícitas, la OI no sólo va a tener las competencias del tratado constitutivo sino también aquellas que resulten necesarias para el cumplimiento de los fines previstos en el tratado constitutivo.

Un ejemplo de esto lo podemos encontrar en el art. 235 del tratado constitutivo de la CE.

29.3. Miembros y estructura

Hablar de los miembros es señalar que las OI surgen por iniciativa de los Estados.

The founding members are those who make the constitutive treaty, as opposed to those who are accepted after they will have to comply with the rules of the constitutive treaty for the admission of members.

Participation in IOs is free and voluntary, so that IO treaties often have rules for the admission of new members. Some of these rules for the admission of new members establish substantive requirements (characteristic of the new candidate or member) and others establish procedural requirements.

However, the distinction between founding members and later members does not imply that there is a difference in rights, they all possess equal rights. But membership is not immutable. A State may decide to withdraw from the IO and may do so regardless of whether this circumstance is foreseen or not.

The State can be expelled from the IO. There are two possibilities:
+ exclusion when you repeatedly fail to comply with your obligations
+ temporary suspension of membership rights
But this does not usually happen for reasons of political pragmatism.
Membership is a category of full participation against cases of restricted participation by associate or observer status. In this case, these figures that entities have do not usually have, for example, the right to vote. This is the status reserved for other IOs, NGOs, ...
An example. The fact is that the EC's full participation in the FAO has been accepted.

Organizational or Institutional Structure

When States create an IO, they will provide it with a set of bodies that will be specific to that IO, permanent and independent. They will be entrusted with the exercise or fulfillment of the functions entrusted to the OI.

The existence of this set of organs has a fundamental character since they are the ones that endow the OI with the characteristics of stability and permanence.

There is no uniform structure, but in any case a distinction can be made between different types of bodies depending on a particular aspect, due to the fact that the set of bodies will be fixed in the founding treaty. However, it may happen that over time new needs arise and the bodies already established are insufficient, with the result that new organs will be created.

This creation can be done in two ways:

- through an act of the OI. An organ is created and assigned tasks assigned to it by the creative organ. They are the SUBSIDIARY BODIES, as opposed to the main organs that are those that appear in the constitutive treaty.
  Ex: UNGA (main) ! DºI Committee (subsidiary)
- Through a new international agreement in which it is decided to create new bodies.

Despite the fact that the institutional structure is very heterogeneous in the doctrine, an attempt has been made to make a classification of the organs. The criteria would be three: composition, representativeness and main function.

According to the composition we can talk about:

- Intergovernmental bodies: those that are composed of representatives of the IO Member States. Ex: UNGA

- Integrated bodies: composed of personnel chosen by personal or professional qualities, although in these cases the note of statehood is present because a certain geographical distribution is taken into account. Ex: JIT

In view of representativeness, we distinguish between:

- Plenary bodies: all Member States are represented in them.
- Restricted bodies: only a specific number of members participate. The way to determine participation may be determined by a specific provision of the constituent treaty or by election.

Ex: CS (restricted) / UNGA (plenary) art. 23 paragraph 1 UN Charter
As for the main function we can talk about:

- UNGA DeliberativeBodies
- SC decision-makingbodies
- Administrativebodies General Secretariat
- Advisory bodies Economic and Social Committee of the CCEE
- Legal, political and financial control bodies

29.4. Formation of institutional will

IOs are endowed with a set of bodies that ensure stability and permanence but also allow the IO to express a legal will different and independent of that of the Member States.

Esta voluntad jurídica se forma en el seno de los órganos, para lo cual hay una serie de procedimientos en los que podrán participar todos o algunos de los órganos, y todos los actos y decisiones de la OI van a conformar lo que se llama el "Derecho de la OI".

¿Y cuales son los modos de adopción de decisiones? Son tres:

- Unanimidad ! Es el sistema de votación más clásico y es expresión del principio de igualdad soberana de los Estados, pero se podría paralizar la actividad de la OI porque bastaría con que un Estado se opusiera reiteradamente para que la OI no pudiera cumplir su misión. Para evitar esto se han adoptado diferentes métodos:
- Disidencia - implica que la decisión se puede adoptar pero no será obligatoria para aquellos que hayan votado en contra o se hayan abstenido.
- Abstención (o no participación) - método desarrollado en el seno del CS. Implica que la abstención o no participación de miembros permanentes no quiere decir que están ejerciendo el derecho de veto. Han de hacerloexpresamente.
- Majority! It is the most widespread in IOs. This majority can be simple, absolute or qualified. This method allows decisions to be easily taken. A decision is taken but may be virtually inapplicable if the States that opposed it have the most specific weight in the IO. To avoid this, a number of elements have been introduced:
- Weighting of votes - Not all states will have the same number of votes but there will be representation based on geographical or demographic criteria. Ex: European Parliament
- Right of veto - To take a decision it is necessary to have the support of certain States that with the exercise of the veto can annul a proposal.
- Consensus! Adoption of a decision without resorting to the formality of a vote. It arises to avoid the disadvantages of the majority, it is a question of favouring negotiation to take account of the interests of all Member States. This leads to the elaboration of vague texts with problems when interpreting.

29.5. International actors

IOs have a number of functions. For their fulfillment, IOs have a number of competences; they are endowed with a set of bodies within which decisions are taken for the fulfillment of the purposes of the IOs.

IO needs a set of individuals who are able to exercise the skills in practice and meet the objectives.

These people are the International Agents. This is a denomination that encompasses different categories of people. There are people who are permanently and professionally linked to the IO, they are international civil servants. They may also be linked to the IO on a temporary basis, such as international observers in an electoral process.

These persons exercise functions entrusted to the IO and act on its behalf. We are going to refer above all to the international civil servants who act permanently and professionally in the service of the IO. They will be subject to a set of legal rules defined by the OI, namely the Civil Servant's Statute.

The official has an obligation of loyalty to the IO because in addition to being an international civil servant he is a national of a State and yet can only act under the orders of an OI.

The existence of this legal link implies that the acts of the official will be imputable to the IO in such a way that, if the official commits an unlawful act, the responsibility is imputable to the IO. In the same way that if it is the object of an unlawful act the IO may claim.

On the other hand, conflicts between an official and an IO will be resolved within the IO for which it will be equipped with a series of bodies in this regard.

Ex: UN Administrative Tribunal

The international civil servant will also enjoy a number of privileges and immunities as he acts on behalf of the IO.

29.6. Dispute settlement within IOs

The emergence of IOs has led to an expansion and diversification of settlement opportunities and avenues in the field of dispute settlement, insofar as they have been created to foster cooperation between States. Hence, IOs have a strong interest in settling disputes among their members.

An IO may be called upon to intervene in the settlement of a dispute as set out in art. 33 of the UN Charter. An IO may resort to non-jurisdictional procedures by endowing one of its bodies with the role of mediator, conciliator.

Ex: UN Secretary-General

The IO may also invite them to resort to a particular means of settling disputes. It usually recommends those of a jurisdictional nature to resolve specific disputes, as provided for in the World Trade Organization.

The participation of IOs has a number of consequences: the notion of controversy is broadened, the subjects are broadened and disputes acquire a certain multilateral character even if they have begun bilaterally.

In addition, the participation of OI limits to some extent the principle of freedom of choice of means because the IO may impose or induce the parties to a dispute to resort to certain measures provided for in the IO.

On the other hand, the participation of IO bodies eliminates the problems of political means as they normally depend on the will of the parties to the dispute. The participation of an IO body gives the means of settlement a note of impartiality. And States can be placed in the position of having to accept the resolution since, for example, it could be that the rejection of the resolution would not be understandable to public opinion.

Ex: The US had to accept the agreement of the UN Secretary General and Iraq because from the point of view of public opinion the rejection was hardly justifiable.

The involvement of IOs gives rise to new type

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