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The evolution of international law

ANTHONY CLARK AREND

Prior to 1800, diplomats and scholars typically used the phrase "law of nations" to describe what we now call international law. The United States Constitution, for example, empowers Congress with the authority to "define and punish . . . Offences against the Law of Nations."[1] Whatever term one uses, over the past five hundred years or so, legal rules have developed on the international plane that have woven a normative web in an effort to provide order and stability.

The purpose of this chapter is to explore the development of international law by tracing its origins from the early days of the modern state system to the present. Any discussion of the evolution of international law must, however, begin with an important caveat: the basic framework for the contemporary international legal system is a Western creation. Just as the Western system of sovereign territorial states – for good or ill – ultimately formed the basis for the global international system, so too did the European concept of international law come to define legal rules on the global plane. This observation is by no means meant to deny other traditions of law that have existed in other parts of the globe prior to the creation of the contemporary system.[2] For many centuries Islamic law, in its several forms, served as international law in large parts of the world. But the current system of law among states is best understood as the heir to the Western tradition.

With this caveat in mind, we can now take up the first question in understanding the evolution of international law: what is international law?

1 United States Constitution, art. I, sec. 8.

2 See Adda B. Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1971) for a thoughtful discussion of other approaches to law and their relationship to the contemporary international legal system.

Definition

As it is used here, the term international law – as well as the older term, law of nations – refers to a set of rules that are binding on international actors. This deceptively short definition, however, requires a little unpacking. First, when we speak of international law, we are referring to concrete rules of behavior – a twelve nautical mile territorial sea limit, the right of states to use armed force in self-defense, the right of diplomats to be immune from criminal prosecution in their host state, the requirement to fulfill treaty obligations, and so forth. Second, rules of international law, unlike other types of rules that may exist at the international level, are *binding*. They have a distinctive normative status. They are not like rules of etiquette or informal norms or rules of morality.[3] The actors to whom the rules are addressed have a *legal* obligation to carry out the rules. Moreover, while international legal rules – much like even some domestic legal rules – may not always be enforced, the creators of these rules perceive that it would be legitimate to enforce these rules through appropriate legal process – unlike, say, rules of etiquette or rules of morality. Finally, international law is binding on *international actors*. This may seem to be an obvious statement, but it is important to clarify this aspect. While *states* are typically seen as the primary actors in the international system, there are a variety of other actors. These include intergovernmental organizations (like the United Nations, the Arab League, the International Monetary Fund, the World Health Organization), supranational organizations (the European Union), non-governmental organizations (like the International Committee of the Red Cross, Amnesty International, Green Peace), multinational corporations (like ExxonMobil, Siemens, IBM), sub- and trans-state ethnic groups (like the Kurds, the Basques, the Inuit), trans-state political groups (like al-Qaeda), and even individual persons (like pirates, war criminals, and others). While not every rule of international law applies to every actor, there are certain rules that do apply to each type of actor noted above.

Before Westphalia – the law of nature

But what is the source of these rules? Some might argue that true international law was not possible prior to the emergence of the modern state

3 See Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press, 1999), pp. 16–25, for a discussion of types of rules.

system – typically seen as beginning with the Peace of Westphalia in 1648. And while it may be true that "inter-state" law could not develop before there was a state system, there were claims prior to 1648 that there were certain rules that were binding on international actors. Typically, the source of these rules was seen as natural law or as it is often referred to in older texts, the *law of nature*.

The origin of the law of nature is traditionally found in ancient Stoic philosophy – beginning in ancient Greece and carrying through the classical Roman period. In its basic form, natural law asserts that there are certain fundamental norms of right and wrong behavior that are eternally and universally valid and that could be discovered by reason.

As the Roman Empire came to an end, and Christianity came to be the dominant philosophical framework in the West, natural law thinking persisted. Indeed, very early Christian writers saw a compatibility between natural law and Christianity. For example, the writer of the Epistle to the Romans notes that even though the Gentiles had not been privy to the revelation given to Israel, they were still able to "do by nature what the law requires" because "what the law requires is written on their hearts" (Romans 2: 14–15). Subsequent Christian writers, such as Augustine and Aquinas, further developed this natural law approach. And by the late-medieval period, natural law was being applied to the behavior of international actors. Scholastic writers, including Francisco de Vitoria and Francisco Suárez, applied the insights of natural law thinking to international relations. In *De Indis*, for example, Vitoria sought to address the question of whether the European *conquistadores* were bound by any norms in their interactions with the non-Christian inhabitants of the Americas. While not yet developing an idea of a "law among nations," Victoria argued that there were universal natural law principles binding on all persons[4] and thus these implicitly applied to the leaders and representatives of states.

By many accounts, Hugo Grotius was the first thinker to articulate a concept of a law that was binding on *states per se*. While acknowledging that the "law of nature" was the basis for society and thus the ultimate origin of law, Grotius argued that states could also create law through their consent. He explained:

> But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate

4 Arthur Nussbaum, *A Concise History of the Law of Nations*, rev. edn (New York: Macmillan, 1954), pp. 79–84.

> as between all states, or a great many states; it is apparent that the laws thus originating had in view the advantage, not of particular states, but the great society of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.[5]

Grotius published these words in 1635, in the midst of the Thirty Years' War, and undoubtedly the devastation that the war brought to the heart of Europe influenced Grotius's desire to affirm the existence of a society of states bound by a common law. But this idea of a law of nations created through state consent would become solidified and become the dominant approach to international law following the end of the War and the conclusion of the Peace of Westphalia.

Westphalia and the rise of positivism

For the emerging European system, the Peace of Westphalia meant the formal recognition of a new system of international relations. In this new system, the territorial state was acknowledged as the primary actor in the international system. The concept of the territorial state was a fundamental change. In theory, there were to be firm geographical borders separating states. States were considered to be sovereign within these boundaries. This meant they were independent, autonomous, and thus juridically equal. In this conception of sovereignty, the borders between states were sharp, with no shading or fuzziness, which other schools of legal thought in other parts of the world allowed. As such, states could be bound by no higher law without their consent.

This recognition of sovereignty as the ordering principle of the international system reflected a fundamental challenge to the way in which "law among nations" could be conceived. While a natural law approach asserted that irrespective of consent, certain principles bound international actors, sovereignty meant that states could only be bound *as a matter of law* through their consent. This concept of consent-based law is captured in the notion of *legal positivism*. While to many scholars and practitioners, natural law principles continued to exist as part of international morality, positive law only existed when created through the consent of states.

One classic illustration of this break between a natural law-based international law and a positivist approach to international law can be found in the

5 Hugo Grotius, "Prolegomena," *De Jure Belli ac Pacis*, reprinted in Robert J. Beck, Anthony Clark Arend, and Robert D. Vander Lugt, *International Rules: Approaches from International Law and International Relations* (Oxford University Press, 1996), p. 43.

celebrated US Supreme Court decision in *The Antelope* (1825). In this case, the Court had to determine if the slave trade was a violation of international law. In the opinion of the Court, Chief Justice John Marshall concluded that the slave trade was indeed immoral, a violation of the "law of nature." But it was not a violation of the international law because states continued to consent to its practice.[6]

In the early twentieth century, the Permanent Court of International Justice succinctly reaffirmed the positivist approach to international law. In the 1920 case of *The Lotus*, the Court explained that

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

This is the classic statement of positivism. States create law through their consent; absent that consent, their sovereign status allows them to behave as they like on the international plane.

Not surprisingly, one of the hallmarks of the Westphalian system of consent-based international law was the lack of a centralized enforcement system. As scholars would note later, the international system was "anarchic,"[7] there was "no common power"[8] to enforce the law. This did not mean that international law was never enforced, but rather that it was enforced though a system of "self-help." What this meant was that states took it upon themselves to enforce what they perceived to be violations of international law. One prominent means of exercising self-help is by undertaking a "reprisal." In essence, a reprisal is an act that if taken in and of itself would be a violation of international law, but when undertaken in response to a *prior* illegal act, would be deemed lawful. If, for example, one state were to illegally abrogate a trade agreement with another state, it would be lawful, as a reprisal, for the victim state to abrogate some other agreement between

6 *The Antelope*, 23 U.S. 120–121 (1825).

7 The idea that the international system can be described as "anarchic" is often associated with the structural realist scholar, Kenneth N. Waltz; see Kenneth N. Waltz, *Theory of International Politics* (New York: Random House, 1979).

8 Drawing upon a phrase from Thomas Hobbes, Professor Robert J. Lieber titled his international relations theory volume, *No Common Power*; see Robert J. Lieber, *No Common Power: Understanding International Relations*, 4th edn (Upper Saddle River, NJ: Prentice Hall, 2001).

the two states. Reprisals could, of course, also involve the use of military force. If a state were to sink the naval vessel of another state, the victim state might choose to retaliate by sinking a similar naval vessel of the first state.

Modern international law and the growth of custom

With a growing acceptance of a positivist approach to international law, the international community recognized that there were two primary ways in which states could consent to create rules of international law: treaties and custom.

Treaties are the most obvious way in which states create law – and indeed the use of treaties dates back millennia. A treaty could be limited to two parties (a bilateral treaty), or could involve many parties (a multilateral treaties). The term "convention" is frequently used to signal a treaty that is multilateral in nature. Some conventions are open to ratification by all states in the international system – such as the Genocide Convention or the Convention on the Rights of the Child – while other conventions are limited to a particular group of states – such as the European Convention on Human Rights or the American Convention on Human Rights.

A second primary way in which states create law by consent is through *custom*. Customary international law comes about not by what states put down in writing but rather by *what they do in practice*. A rule of customary international law starts to develop when a state or a group of states begins to engage in a particular international behavior – often for purely pragmatic, practical reasons. Over time, more and more states begin to engage in that practice until, eventually, nearly all states in the international system are engaging in that practice. At the same time that the practice is becoming widespread, states are also beginning to believe that the practice is obligatory – that it is required by law. Once the practice is nearly universal, and states generally believe the practice is obligatory, it can be considered customary international law. In short, a rule of customary international law is a "usage" that over time "ripens" into a rule of law.[9]

What this process means is that for a rule of customary international law to exist two elements must be present: practice and belief. First, states must engage in a particular activity. Second, they must believe that engaging in

9 I draw here upon the language found in the famous *Paquete Habana* case, where the Supreme Court determined that fishing vessels were exempt from seizure during time of war under customary international law. *The Paquete Habana*, 175 U.S. 677, 686 (1900).

that activity is obligatory. Or, to use the Latin term, there must be *opinio juris*, there must be a belief that that activity is required by law.

With this essential understanding of the sources of international law, custom became the primary means whereby system-wide international law was created in the Westphalian system. Accordingly, customary rules developed relating to a whole host of international subject areas. For example, customary law developed with respect to "international personality," that is, the question of when an entity enjoys rights and duties in the international law. In particular, rules developed about statehood and the basic rights of states. Rules were also created about the acquisition of territory – the circumstances under which a state could obtain sovereignty over land – an especially important issue in the seventeenth, eighteenth, and nineteenth centuries during a time of Western colonialism. State practice also gave rise to rules of jurisdiction – the conditions under which a state can exercise its authority over individuals, other legal persons, things, or events. Similarly, rules developed about immunity from jurisdiction. Indeed, modern international legal rules about diplomatic immunity find their precursors in ancient practices of the Egyptians, Hittites, Greeks, and Romans and constitute one of those areas of law that are typically known outside of the legal community. Another area where rules of custom developed relates to state responsibility for treatment of aliens. While there was no human rights law as such prior to the Second World War, there were extensive legal norms about how a state must treat non-citizens in its territory. Another prominent area where rules of custom developed related to the law of the sea. Customary international law came to recognize what might be called the "Grotian notion of the ocean,"[10] the principle that states would be entitled to a narrow band of territorial sea adjacent to their coast in which they would enjoy sovereignty, while the rest of the vast oceans constituted the "high seas" and thus fell under no state's exclusive sovereign jurisdiction. And, of course, state practice produced extensive legal rules relating to the recourse and conduct of armed conflict.

Many of these rules of customary law had their origins in natural law precepts that existed prior to the emergence of the modern state system. The laws relating to armed conflict, for example, find their origins in ancient religious teachings and the works of classical writers, such as Plato and Cicero, and early Christian writers, like Augustine and Thomas Aquinas.

10 Hugo Grotius first published *Mare Liberum* in 1609, where he advanced this argument. A recent version can be found at Hugo Grotius, *Mare Liberum: 1609–2009* (Leiden: Martinus Nijhoff, 2009), ed. Robert Feenstra.

But what distinguishes these rules of customary international law from these early nature-law based norms, is that the rules obtained their status of law through the consent of states.

The rise of the multilateral convention

While customary international law continues to this day to be the bedrock of international law, beginning in the nineteenth century, states increasingly used multilateral treaties as a means to establishing system-wide, or near system-wide, law. Of course, multilateral treaties were not a creation of the 1800s, with such notable earlier treaties as those associated with the Peace of Westphalia – the Treaty of Osnabrück and the Treaty of Münster. Those older treaties, however, were typically used to set up a *modus vivendi* following a particular conflict and were not broad law-creating instruments. The use of multilateral treaties to create rules of international law on a more general basis began in the nineteenth century. Typically, these treaties were produced at major international conferences, and then sent out for ratification by states. One of the earliest such conferences was the 1864 Geneva Conference. Attended by sixteen states, the Conference produced the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which served as the foundation for a long series of Geneva conventions dealing with the law of armed conflict.[11]

This trend to produce major multilateral conventions at international conferences continued as the nineteenth century was coming to a close. At the suggestion of Tsar Nicholas II of Russia, the first International Peace Conference was convened at The Hague in 1899, with twenty-six states in attendance.[12] The Conference was remarkable for several reasons. First, it was one of the first international conferences to address "international problems in the abstract,"[13] rather than the consequences of a specific war. Accordingly, the Conference produced a large number of conventions dealing with international conflict, including the Convention for the Peaceful Adjustment of International Differences, the Convention

11 See, International Committee of the Red Cross, "From the battle of Solferino to the eve of the First World War," at www.icrc.org/eng/resources/documents/misc/57jnvp.htm.

12 Inis L. Claude, Jr, *Swords into Plowshares: The Problems and Progress of International Organization*, 4th edn (New York: Random House, 1971), pp. 28–34.

13 Ibid. p. 30.

Regarding the Laws and Customs of War on Land, and the Convention on Maritime Warfare.

Second, the 1899 Conference was meant to usher in a broader "Hague Conference System." The idea was to hold a similar international conference every several years. In 1907, a second Hague Conference took place, and, once again, the delegates adopted a number of conventions that were then sent out for ratification. Unfortunately, the Great War intervened, and what would have been the 1915 Hague Conference did not occur. Third, unlike meetings of the Concert of Europe that had taken place earlier in the century, the Hague Conference System, sought a different level of "universality."[14] Not only were the Great Powers included, but so too were some smaller states. Moreover, while the twenty-six states that attended the 1899 Conference were mostly European, among the forty-four states that attended the 1907 Conference were a number of non-European states, including some from Latin America.[15]

Even though there was no third Hague Conference, the conference approach to creating major multilateral legal instruments continued throughout the twentieth century and beyond. States, through international conferences, have over the years produced such notable agreements as the four 1949 Geneva Conventions on International Humanitarian Law, the four 1958 Geneva Conventions on the Law of the Sea, the 1961 Vienna Convention on Diplomatic Relations, and the 1982 Convention on the Law of the Sea. While, technically, conventions are only binding on the states that have formally ratified them, many of these multilateral conventions have been so widely ratified and reflected in near-universal practice that they are considered representative of customary international law.

The rise of global institutions

The twentieth century saw a new development in the international law-making process, the establishment of the global international organization. While public international organizations had existed at least since the early 1800s, these organizations – like the Commission on the Navigation of the Rhine, or the Universal Postal Union – had very limited regional or functional authority. It was not until the League of Nations was created in the aftermath of the First World War, that the international community witnessed the establishment of a general purpose international organization that had the potential for universal membership.

14 Ibid. p. 29. 15 Ibid. p. 29.

The League era

The League of Nations was created by a multilateral agreement, the Treaty of Versailles (1919). While the League of Nations was not in any true sense a centralized legislature, the organization was able to take the lead in convening additional international conferences for the purpose of both codifying existing customary international law and developing new law. For example, under the auspices of the League of Nations, the 1930 Hague Conference on Codification of International Law was convened to explore a wide variety of areas of customary international law with a view toward drafting written agreements to codify that custom.

Moreover, under the League, the first true "World Court" was created, the Permanent Court of International Justice (PCIJ). From the perspective of the development of international law, four aspects of the Court are especially noteworthy.

First, the treaty that officially established the Court, the Statute of the Permanent Court of International Justice, provides what would become the standard articulation of the sources of modern international law. Article 38 of the Statute[16] provides, in part:

> Article 38
> The Court shall apply:
> 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> 2. International custom, as evidence of a general practice accepted as law;
> 3. The general principles of law recognized by civilized nations.

The first two paragraphs are familiar in the traditional positivist context – treaties and custom. But the third source, "general principles of law recognized by the civilized nations," is a bit more challenging. The provision was drafted by the 1920 Advisory Committee of Jurists, and there seems to have been no clear view as to what meaning they intended.[17] While this third

16 League of Nations, *Statute of the Permanent Court of International Justice*, December 16, 1920, available at www.unhcr.org/refworld/docid/40421d5e4.html, accessed September 6, 2012.

17 Manley O'Hudson, who served as a Judge of the PCIJ, noted in 1943:

> Members of the 1920 Committee of Jurists expressed varying views as to the meaning of this provision when it was drafted, and the confusion was not dissipated by the Committee's report.

Cited in Marjorie M. Whiteman, *Digest of International Law*, 14 vols. (Washington, DC: Government Printing Office, 1963), vol. 1, p. 91.

source has been interpreted by some to indicate the incorporation of non-consensual principles, many scholars claim that "general principles of law" might refer to certain principles of domestic law that are common to states' legal systems. If, for example, virtually all states had the principle of "double jeopardy" as part of their domestic legal systems, it could be argued that such a principle could be applied in an international dispute among states. Under this interpretation of general principles, consent would still be the basis of the rule. The logic is that since states have accepted these principles in domestic law, it could be assumed that they would consent to the principles being applied in disputes at the international level.

Second, decisions of the Court were binding on the parties to the case. This meant that they had a legal obligation to carry out decisions rendered by the Court.

Third, the Court was empowered to issue advisory opinions at the request of the League of Nations.[18] Advisory opinions were, of course, just that, "advisory," and not binding upon any state or the League itself.

Fourth, even though decisions of the Court were technically only binding upon the parties,[19] the Court's articulation of legal principles came to be seen as good evidence of customary international law. In other words, Court decisions tended to be favorably cited as authoritative pronouncements of the law. While the Court only issued decisions in twenty-nine contentious cases and twenty-seven advisory opinions,[20] a number of these decisions continue to be cited as evidence of customary international law.

The League of Nations also introduced an element of centralized enforcement for violations of international law. As noted earlier, a key feature of the Westphalian system was the role of "self-help" in enforcing

18 Article 65 of the Statute of the Court provides:

> Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council. The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

League of Nations, *Statute of the Permanent Court of International Justice*, December 16, 1920, available at www.unhcr.org/refworld/docid/40421d5e4.html.

19 Article 59 of the Statute provides "The decision of the Court has no binding force except between the parties and in respect of that particular case." Ibid.

20 International Court of Justice website, www.icj-cij.org/pcij/index.php?p1=9.

international law. But the First World War, with its unprecedented destruction and casualty toll, pointed to the problematic nature of a self-help system and gave rise to the desire to give the new organization enforcement powers. And so, with the creation of the League, the international community saw for the first time a centralized body that could enforce rules of international law.

Under the League Covenant, there were a series of complex restrictions on the recourse to war. In the event that a state were to initiate a war in violation of these restrictions, the League Covenant provided that all other members of the League were to immediately impose economic and diplomatic sanctions on the offending state, and that "[i]t shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."[21] While the decision of the League Council was only a *recommendation*, this was nonetheless a significant development in the enforcement of international law. And even though these mechanisms proved unable to counter the Italian invasion of Ethiopia (1936), the Japanese invasion of Manchuria (1931), and the multiple German invasions of neighboring lands

21 Article 16 of the League Covenant provides in full:

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.
>
> It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.
>
> The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.
>
> Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

(1934–), the League arrangement for enforcement served as a prototype for the United Nations system.

The United Nations era

While the League of Nations was unsuccessful in preventing the Second World War, there was a general consensus on the part of the Allied states that a new, better global organization would be needed to replace the League when the war was over. Indeed, it seems likely that the ability of such disparate states as the United States, the Soviet Union, the United Kingdom, and China to collaborate effectively during the war reinforced the notion that such collaboration would be possible during peacetime in a new organization.

Following a series of conferences during the war, the United Nations officially came into being on October 24, 1945. Among the many goals for the new organization articulated in the Charter was "encouraging the progressive development of international law and its codification."[22] Viewing the organization as a whole, there have been several ways in which the United Nations itself has promoted the evolution of international law. At a basic level, this can be seen in three of the major organs of the United Nations: the International Court of Justice (ICJ), the General Assembly, and the Security Council.

As the successor to the Permanent Court of International Justice, the International Court of Justice has continued to issue decisions that have served as evidence of customary international law. Since 1947, the ICJ has dealt with 135 contentious cases and issued 26 advisory opinions as of early 2015. ICJ decisions have helped develop a jurisprudence that has advanced customary international law.

The United Nations General Assembly has also played a critical role in developing international law. While with the exception of a few minor areas, resolutions adopted by the General Assembly are non-binding recommendations, it is not unusual for those resolutions to affect the development of binding law in several ways. First, many resolutions serve as a basis for a treaty. For example, in 1948, the General Assembly adopted the Universal Declaration of Human Rights. While simply a non-binding resolution, the Declaration served as both the basis and the impetus for two agreements, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which were produced in

22 United Nations Charter, art. 13.

1966 and submitted to states for ratification. Second, some General Assembly resolutions may actually codify pre-existing customary international law. In other words, the resolution may simply put down in written form what states have accepted as a matter of custom. As such, the resolution could be cited as a short-hand for a rule of custom. Third, if the General Assembly adopts a resolution that purports to make a claim about a legal rule, that resolution can be cited as evidence of state practice. Here, as with any specific item of evidence used to indicate the existence of a rule of customary law, the resolution would not be dispositive, but would rather be one data point demonstrating possible state practice.

Another role that the General Assembly played in the creation of international law was the establishment of the International Law Commission (ILC) in 1947. Consisting of thirty-four experts in international law elected by the General Assembly, the International Law Commission has as its purpose "the promotion of the progressive development of international law and its codification."[23] Since its creation, the ILC has carried out this goal in a variety of ways, including by serving as the principal author of draft conventions that provide the starting framework for an international conference. So, for example, the International Law Commission prepared drafts of four oceans law treaties that were discussed and approved at the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958. The ILC also developed drafts for the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention in Consular Relations, and the 1969 Vienna Convention on the Law of Treaties.

The Security Council, of course, has also performed a critical role in the UN era. Unlike the Council to the League, the Security Council is empowered by the Charter to adopt binding resolutions within its area of competency. What this has meant in practice is that the Council has been able to adopt measures aimed at the enforcement of international law relating to international peace and security. Under Article 39 of the Charter, the Council is empowered to determine if a state has committed a threat to the peace, a breach of the peace, or an act of aggression.[24] If the Council so determines, it

23 Statute of the International Law Commission, art. 1, http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf.

24 Article 39 provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

is further empowered to order states to impose economic and diplomatic sanctions on the offending state.[25] And if those sanctions prove ineffective, or if the Council determines at the outset that such sanctions would prove ineffective, the Council may authorize the use of military force against the recalcitrant state.[26] During the Cold War period, the veto power of the five Permanent Members (China, France, Great Britain, the Soviet Union, and the United States) typically prevented the Council from undertaking military measures to enforce the law. Indeed, the only exception came when the Council authorized force in response to the invasion of South Korea by North Korea in June of 1950. And that action was possible only because the Soviet Union could not exercise its veto because it was boycotting the meetings of the Security Council over of the presence of Taiwan in the "China" seat on the Council. But even during the Cold War, the Council proved able to impose economic and diplomatic sanctions in a variety of settings. And with the end of the Cold War, the Council authorized the use of military force in several important cases.

Examples of economic and diplomatic sanctions include: (1) Actions against Rhodesia (1966 and following) and South Africa (1977 and following) to respond to overtly racist states, something about which the entire Security Council could agree; (2) Actions against Iraq following the invasion of Kuwait (1990 and following); (3) Actions against Libya for falling to extradite those sought for the Pan Am Flight 103 bombing (1992 and following); and (4) Sanctions against Iran relating to its nuclear program (2006 and following). Examples of authorizations to use military force include: (1) Actions against Iraq for the invasion of Kuwait (1990 and following); (2) Actions in the Balkans against Serbia (1992 and following); (3) Actions following the coup in Haiti (1994); (4) Actions in Somalia (1992 and following); and (5) Actions against Libya following the Arab Spring (2011). This spurt of Security Council activity to enforce international law since 1990 reflects an important change in the distribution of power in the international system. In those early days, the Soviet Union (and then Russia) had lost its influence over Eastern Europe and beyond and was seeking to maintain power though co-operation in multilateral bodies, such as the United Nations.

Turning to specialized and functional international organizations, during the UN era, international law also developed through the operation of a

UN Charter, art. 39 (1945). Interestingly enough, these terms are not defined in the Charter, leaving it up to the Council to use its discretion to determine what constitutes a "threat to the peace," "breach of the peace," or an "act of aggression."

25 Ibid. art. 40. 26 Ibid. art. 42.

growing number of specialized international organizations. Following in the tradition of the Public International Unions of the 1800s, and the International Labor Organization (ILO), which was established in 1919, states created organizations to address a host of issues that needed some level of international co-operation. These organizations include such varied institutions as the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO), the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), the World Intellectual Property Organization (WIPO), the International Atomic Energy Agency (IAEA), and the World Meteorological Organization (WMO). While these organizations have differing connections to the United Nations, each of them is formally established pursuant to its own treaty and has its own governing document.

Some of these organizations have important law-creating powers. The WTO, for instance, creates rules of international law that are binding upon its members, as does the International Seabed Authority. Others have the authority to take measures to enforce rules that have been established through international agreements relating to the specialized field. The Organisation for the Prohibition of Chemical Weapons, for example, is empowered to take certain measures to enforce the Chemical Weapons Convention.

While the previous discussion has dealt with the development of "global international law," it is important to note one very special case relating to what might be called "regional international law," the European Union. The EU has its origins in treaties concluded in the 1950s to establish the European Coal and Steel Community and the European Atomic Energy Community. That evolved into the European Union by 1993. What is most significant about the EU from the perspective of international law is that some of its organs have the authority to promulgate legal rules that are not only binding upon its member states but are actually directly binding upon persons and firms within the member states. For this reason, some have described the EU as a "supranational,"[27] rather than an "international" organization. To date, the EU is unique among international organizations

27 As Harold Jacobson notes, "Supranational organizations have the authority to take actions that have direct application to individuals and such legal entities as corporations." Harold Jacobson, *Networks of Interdependence: International Organizations and the Global Political System* (New York: Knopf, 1979), p. 49.

in its ability to create legal rules in this fashion. Since the creation of these special European institutions, scholars and public officials have often speculated that states in other regions would seek to establish similar institutional arrangements. But perhaps due to the particular historical and political development of Europe, states in other regions have not replicated the EU's legal role.

The rise of the individual and the development of international human rights law

One of the most significant substantive developments in international law during the UN era has been the creation of law relating to the rights of the individual. As noted above, prior to the Second World War there were virtually no international legal rules that regulated how a state treated its own nationals. But with the revelations of the mass atrocities that occurred during the War – including the Holocaust – the founders of the United Nations resolved to make the promotion of human rights a major goal of the new global organization. To this end, the Preamble to the UN Charter provided that the "people of the United Nations" were determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."[28] Accordingly, one of the first tasks of the fledgling organization was to develop a document relating to the rights of individuals. This document, as mentioned earlier, became the Universal Declaration of Human Rights, which was adopted as a General Assembly resolution in 1948. The Universal Declaration set the stage for the development of a series of treaties relating to human rights. In addition to the two 1966 Covenants (Civil and Political Rights; Economic, Social and Cultural Rights), human rights related treaties that were developed include: the Genocide Convention (1948), the Torture Convention (1984), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the Convention on the Rights of Persons with Disabilities (2006), the Convention for the Suppression of the Traffic in Persons (1949), and the Convention Relating to the Status of Refugees (1951). Beyond these global agreements, regional organizations produced a variety of human rights agreements for their regions. These include the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), the African

28 UN Charter, Preamble.

Charter on Human and Peoples' Rights (1981), and the Arab Charter on Human Rights (2004).

But even while the international community was producing these conventions on human rights, the substance of human rights was hotly contested. During the Cold War, the United States and its allies regarded civil and political rights – such as freedom of the press, freedom of speech, the right to participate in governance – as "real" human rights, and tended to consider economic, social, and cultural rights – such as the right to employment, the right to health care, the right to an education – as aspirations and not truly rights. Conversely, the Soviet Union and its allies prioritized economic, social, and cultural rights over political and civil rights. Consequently, there was minimal progress during the Cold War in establishing effective, universal implementation of these agreements.

But as the Cold War was coming to an end in the late 1980s and early 1990s, there were some efforts at institutionalizing implementation of human rights rules. In particular, states began working co-operatively to devise new methods to hold individuals accountable for human rights violations. Following upon the precedents set at the Nuremberg Military Tribunal after the Second World War to punish persons responsible for violating the laws of war or committing crimes against humanity, the post-Cold War era witnessed the establishment of a series of special tribunals to hold persons accountable. The first of these were two tribunals established by the Security Council – the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda – to try persons alleged to have committed violations of international humanitarian law during those conflicts.

As these tribunals were being established, the United Nations was continuing work to establish a permanent criminal tribunal with worldwide jurisdiction. Following preparatory efforts done by the International Law Commission and special committees created by the General Assembly, the United Nations Diplomatic Conference on the Establishment of an International Criminal Court took place in Rome in July of 1998.[29] This Conference produced the Rome Statute of the International Criminal Court, which entered into force in July 2002. As of early 2015, twenty-one cases have been brought to the Court.[30]

29 See Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Lanham, MD: Rowman & Littlefield, 2005), p. 156.

30 www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

The cases include those relating to situations in the Democratic Republic of the Congo, the Central African Republic, Uganda, the Sudan (Darfur), Kenya, Libya, and Côte d'Ivoire.

While such a standing court is an important advance for the enforcement of international human rights law, the ICC has only had modest success. The United States is not a party to the Court's statute, neither are other major actors in the international system, such as Russia, China, Israel, Egypt, and Saudi Arabia. In addition, the Court has been criticized for focusing on Africa and not other parts of the world.

The twenty-first century and beyond – a neomedieval world?

While the twenty-first century is still young, changes in the nature and authority of the actors in the international system have given rise to a development that could challenge the fundamental assumptions underlying the Westphalian system of international law. As noted above, this system is based on the assumption that states are the primary actors in the international system and that states– through their consent – create international legal rules. But what if there were to be a proliferation of a variety of non-state actors *and* the complex interactions among these dissimilar actors were to give rise to legal rules?

In his 1977 work, *The Anarchical Society*, Hedley Bull spends some time speculating on the future of the international system. While Bull ultimately concludes that the state system will persist, he describes one possible model for the international system as a "neomedieval" system. In the classical medieval European system, Bull notes "no ruler or state was sovereign in the sense of being supreme over a given territory and a given segment of the Christian population; each had to share authority with vassals beneath and with the Pope and (in Germany and Italy) the Holy Roman Emperor above."[31] While Bull would not foresee a return to this historical system, he explains that "it is not fanciful to imagine that there might develop a modern and secular counterpart of it that embodies its central characteristic: a system of overlapping authority and multiple loyalty."[32] Two more recent commentators, Bruce Cronin and Joseph Lepgold, capture the essence of a neo-medieval system by explaining that such a system would

31 Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), p. 254.
32 Ibid.

be "defined by actors of increased *diversity* and *heterogeneity* and characterized by overlapping international authorities and conflicting loyalties."[33] In other words, in a neo-medieval system, there might be territorial states, but there would also be a variety of other non-state actors that would be able to exercise authority over individuals. Similarly, in such a system, individuals would feel loyalties to a variety of actors, not just the state. As Bull notes, "[i]f modern states were to come to share their authority over their citizens, and their ability to command their loyalties, on the one hand, with regional and world authorities, and on the other hand with sub-state or sub-national authorities, to such an extent that the concept of sovereignty ceased to be applicable, then a neo-medieval form of universal political order might be said to have emerged."[34]

Over the past few decades, there has indeed been a rather dramatic increase in the number, diversity, and political influence of non-state actors. These include substate actors (such as ethnic communities, like the Kurds or the Basques or the Igbo), suprastate actors (the European Union is thus far the only existing example of such), transnational organizations (such as religious organizations, like the Roman Catholic Church, the Bahá'i International Community or the Organisation of Islamic Cooperation), intergovernmental organizations, trans-state associations (such as the Alps-Adriatic Working Community[35]), transnational or multinational corporations, and trans-state political groups (such as al-Qaeda, Hezbollah and ETA [Euskadi Ta Askatasuna]). These dissimilar actors have in some cases gained certain authority over individuals and have even earned the loyalty of individuals.

While the existence of these actors is not new, their increasing authority may mean that the creation of international legal rules will no longer be the sole domain of states. Even now, intergovernmental organizations can enter into international agreements. And a variety of other non-state actors, like peoples, have similarly entered into treaties. With the

33 Bruce Cronin and Joseph Lepgold, "A new medievalism: conflicting international authorities and competing loyalties in the twenty-first century," unpublished paper presented at the conference on "The Changing Nature of Sovereignty in the New World Order," Center for International Affairs, Harvard University, April 1995, cited in Anthony Clark Arend, *Legal Rules and International Society* (Oxford University Press, 1999), p. 171.

34 Bull, *The Anarchical* Society, pp. 254–255.

35 The Alps-Adriatic Working Community is an association founded in 1978 whose members are regions, cities, and indeed some states in this region that have organized to promote common goals. See http://www.alpeadria.org/english/index.php?page=home%26f=1%26i=home.

proliferation of actors in the international system, it is possible that at some point in the future the complex interactions of these actors will actually give rise to norms of behavior that will come to constitute customary law. This has not yet occurred, but it may as the twenty-first century progresses, and it would represent a fundamental challenge to the international legislative process.

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