

MECHANISMS TO CREATE AND SUPPORT CONVENTIONS, TREATIES, AND OTHER RESPONSES

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Keywords: International law, treaties, conventions, customary international law, sovereignty, Austinian handicap, rule of recognition, law-habit, reciprocity, pacta sunt servanda, opinio juris sive necessitatis

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Summary

International law is a system of norms that exist between states and other international actors, including international institutions and (to a limited extent) individuals. It governs issues as diverse as the use of force, the regulation of international telecommunications, human rights and the law of the sea. It is a decentralized system of law created by states, primarily in the form of international conventions and treaties as well as customary international law. It is also enforced by states; giving rise to the concern that international law lacks imperative character. This article focuses on the history and development of international law before moving to consider the binding nature of international law. Thereafter, consideration is given to the creation and support of international convention and treaties, as well as to the development and maintenance of customary international law.

1. Introduction

Treaties and conventions together constitute one of the two principal sources of public international law, the other being customary international law. Public international law has been defined as “that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other.” (J. G. Starke) It is worth observing that, while international law has traditionally concerned itself with the

relations of independent sovereign states, increasingly, international law is concerned also with the rules governing international organizations and the relations between states and individuals. Nevertheless, it is clear that states remain the primary subjects of international law and, in that respect, much of the following discussion will focus on the role of states in the creation, observance and enforcement of international law.

Although the title of this chapter focuses on the role of treaties and conventions, it is important also to consider the role of customary international law in order fully to understand the function of treaties and other international agreements in the international relations of states. Thus, while treaties and conventions are formal written instruments entered into by states through a process of negotiation, signature, and ratification, customary international law is made up of unwritten rules created as a result of the shared practices and beliefs of states. It is proposed here to provide a brief introduction to the history and development of international law before moving to consider general questions relating to the binding nature of international law and its enforcement. Finally consideration will be given to the mechanisms to create and support international treaties and conventions as well as customary international law.

2. The Historical Development of International Law

International law, in various forms, has governed the relations between different social groupings including, tribes, cities, sovereigns, and, ultimately states, for many thousands of years. Clearly, there was no such thing as international law in prehistoric times. However, some writers have suggested that tribes of cave-dwelling anthropoid apes may have had dealings with one another on such matters as drawing the limits of their respective hunting grounds and bringing to an end a day's battle. It was certainly the case, however, that by the time of the ancients, a form of international law had been firmly established in a number of disparate civilizations including the Ancient Indians, Chinese, Egyptians, Greeks and, perhaps most notably, the Romans.

As empires grew and began to interact with one another, the need for more formalized relations began to emerge. This process led to the enactment of the first known international treaty, which dates from approximately 3100 BC, and was a peace treaty between two Mesopotamian City-States. Many similar treaties of peace and friendship were entered into between the ancients. One of the most notable of such treaties was the Treaty of Kadesh, a Treaty of Eternal Peace and Alliance between Ramses II of Egypt and the Hittite King Hattusilis dating from around 1284–3 BC. As with other treaties of the time, the primary objective was to establish a state of lasting peace between the two empires. It is interesting to note that many of the principles of modern international law were reflected in the treaty, which, for example, recognized the principles of sovereignty, recognition, responsibility, consent, and good faith.

The practice of dealing with other empires by means of treaties of peace and friendship continued into the mediaeval period and beyond. However, by the beginning of the twelfth century, such treaties were no longer concluded between empires; rather, they were agreements between sovereign rulers aimed at asserting the independence of such sovereigns from one another and the equality between them. For example, the Declaration of Arbroath in 1320 took the form of a Petition from the Barons of Scotland to Pope John

XXII containing a request by Scotland to be treated by England on a footing of sovereign equality. This led to the truce of 1328 in which King Edward III finally recognized the independence of Scotland and the position of Robert the Bruce as King of Scotland. In a subsequent truce of 1381 between King Richard II and King Robert of Scotland, the two nations, or, in effect, the two sovereigns were recognized as being equal in the absence of a common superior.

As the interrelationship of sovereigns and their sovereign nations increased, the need for a delimitation of the rules of such relationships increased with it. Beginning in the middle of the fifteenth century, the so-called classical writers began to formulate the rules of international law which, to a greater or lesser extent, were accepted first by the independent sovereigns and, latterly, by states, in their relations with one another. The sources of this “law of nations” were broad and disparate and included ideas of ethics and morals, accounts in imaginative literature, legal doctrines of Roman law and of the canon law, and theological speculations. Undoubtedly, religion was of fundamental importance to the early writers on international law as it had been to the early practitioners. For example, Francisco de Vitoria, one of the earliest classical writers, saw the binding nature of pacts among men as lying in the law which governed the whole world, the law of God, to the extent that those who violated international rules were regarded as having committed a mortal sin. Such reliance on theology continued until the time of Alberico Gentili, an Italian jurist, who became Professor of Civil Law at Oxford. Gentili separated the treatment of international law from that of theology but continued to rely on an extension of Roman law doctrines as a basis of international law.

The most famous and respected of all the classical writers on international law is Hugo de Groot, or, more commonly, Grotius. The basis of Grotius’ philosophy of law is to be found in the *Prologmena* to his definitive work on the law of war and peace, *De Jure Belli ac Pacis*, written in 1625. Grotius believed the basis of international law was to be found in the law of nature which man, above all other species, is able to discover through the maintenance of social order. According to Grotius, law is known to man through the exercise of discretion and rational judgment. In asserting this law of nature, Grotius did not abandon the theological roots of the law. However, Grotius was ultimately able to secularize natural law arguing that it was essential to civilized life. Thus, for Grotius, international law, or the law of nations as Grotius refers to it, was a necessary aspect of the society of States. Ultimately, Grotius believed that it is necessary for states to have regard to the long-term benefits of the maintenance of law in preference to short-term advantage.

The work of these and other classical writers did much to formulate the rules that applied between the independent sovereign nations, which characterized the international landscape of the fifteenth and sixteenth centuries. However, the beginning of modern international law can be traced back to the evolution of the modern state-system in Europe and, in particular, the Treaty of Westphalia in 1648 which brought to an end the Thirty Years’ War and marked the acceptance of a new political order in Europe. Although the role of the classical writers did not disappear, greater and greater emphasis came to be placed on the actual practice of states as the basis for international law.

It is worth noting that the international law of this period was fundamentally different from that of today. International law existed at the time simply to recognize the delimitation

of power among the various members of the international community. Rules on territorial sovereignty existed alongside rules on the acquisition of title to territory, which included the right to take territory by force. Indeed no general constraint was placed on the threat or use of force. Other rules provided, on the basis of *laissez-faire* philosophy, for the freedom of the high seas and freedom of trade. The basic ordering principle was the so-called balance of power, which was based on great power hegemony and the attempts by those great powers not to trespass upon their respective spheres of influence in order to avoid friction and conflict.

The balance of power system continued essentially until the outbreak of the First World War. Nevertheless, the period covering the end of the nineteenth and beginning of the twentieth century was witness to a number of attempts to strengthen the role of international law. Pre-war efforts to develop more fully the rule of law in international relations saw the enactment of the Hague Conventions for the Pacific Settlement of International Disputes in 1899 and 1907 which brought about the creation of the Permanent Court of Arbitration. The period also witnessed the establishment of nascent human rights institutions such as the British and Foreign Anti-Slavery Society and the International Committee of the Red Cross, as well as various proposals for the creation of a system of world law such as that put forward by the Universal Peace Congress in 1908. Thus, international law was beginning to develop in a way that increasingly qualified the unrestricted freedom of states. One of the factors that led to this development was the increased willingness of states to enter into treaties that did more than simply delimit the extent of their independence. A second factor was to be found in the attempts to place legal restrictions on the use of force by states. Both factors were apparent in the creation of the League of Nations.

The League of Nations is generally regarded as having been a failure. However the League did lay the foundations for the later development of the United Nations. In particular, the Permanent Court of International Justice, in spite of its apparent limitations and the initial skepticism of states, managed, during the inter-war period, gradually to increase its workload and many of its decisions remain relevant today. The League was also responsible for the first moves away from the unlimited right of states to use force in international relations. Thus, while the League of Nations Covenant did not itself prohibit war, or the resort to force short of war, it did place certain minimal procedural requirements on the resort to war. In 1928, a number of states signed and ratified the General Treaty for the Renunciation of War, otherwise known as the Kellogg-Briand Pact. The Pact, which supplemented the Covenant and remains in force today, was the first international instrument to attempt to limit the resort to war as an instrument of foreign policy. The Pact too is generally regarded as a failure, not least because of its application only to war rather than to force in general. However, it was the first international treaty that was able to demonstrate that a general ban on war was both politically and legally possible.

The succession of the League of Nations by the United Nations marked the beginning of a new initiative towards the creation of an international society based on the rule of law. The purposes of the United Nations to maintain international peace and security; to develop friendly relations among states; to achieve international co-operation in solving international problems; and to harmonize the actions of states in the attaining of these

common ends, were to be achieved in accordance with seven basic principles. These included recognition of the sovereign equality and internal sovereignty of states, as well as a requirement to fulfill obligations in good faith and to settle international disputes peacefully. Crucially, the Charter required in Article 2(4) that state refrain in their international relations from the threat or use of force.

The Charter provided a framework for the future development of international law. In particular, it further developed the move towards a more coercive system of international law based on collective enforcement. The idea of collective action in international law had been first institutionalised in the Covenant of the League of Nations and was consummated in Chapter VII of the United Nations Charter. As will be shown later, Chapter VII provides for the possibility of enforcement action being taken by the Security Council against state acts that are identified as breaches of the peace, threats to the peace or acts of aggression. The alleged failings of this system are well documented and will be discussed in more detail below. However, it is worth noting at this stage that the drafters of the United Nations Charter envisaged the development of international law in a number of ways that moved beyond the coercive paradigm. For example, the Charter of the United Nations envisaged fuller economic and social co-operation among states and specifically called for the promotion of universal respect for, and observance of, human rights. Similarly, the Charter provided the basis for the creation and implementation of the decolonisation process. Finally, the Charter envisaged a more formalised structure for the pacific settlement of international disputes, headed by the International Court of Justice.

The last fifty years have witnessed many changes in the international system. These have had a profound effect on international law. The Cold War was a dominant factor throughout most of this period. So too was the consummation of the decolonization process, which, coupled with the demise of communism and the break-up, in particular, of the Soviet Union and the former Yugoslavia, has brought about an increase in the number of states from around fifty in 1945 to today's total which numbers in excess of 200 states. New perspectives on international law have emerged during this period, in particular, Soviet and Third World perspectives have challenged the Western dominance of international law. Finally, international law has witnessed an enormous development in the number of fields it encompasses, not least in the fields of international human rights and international environmental law.

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Biographical Sketch

Dr Craig Barker has taught international law at the University of Reading, England, since 1993. He received his Honors Law degree from the University of Glasgow in 1987. His Ph.D., again awarded by the University of Glasgow in 1991 was on the topic of “The Abuse of Diplomatic Privileges and Immunities”. His main research interests lie in the field of international immunities and the relationship between international law and international relations. He has written two books. The first, entitled *The Abuse of Diplomatic Privileges and Immunities* was published in 1996 by Ashgate and the second, published in December 2000 by Continuum, is entitled *International Law and International Relations*. He has written a number of articles on international law, including, most recently, a series of articles examining the decisions of the British House of Lords in *Ex parte Pinochet*. He is currently working on a research project examining the protection of diplomats under international law.