The element of power is inherent in every political treaty. The contents of such a treaty reflect in some degree the relative strength of the contracting parties … Respect for law and treaties will be maintained only in so far as the law recognizes effective political machinery through which it can itself be modified and superseded. (E. H. Carr 1939)

It is not a single world state, but a system in which states are increasingly hemmed in by a set of agreements, treaties and rules of a transnational character. Increasingly, these rules are not based just on agreement between states but on public support generated through global civil society. (Mary Kaldor 2003)

3

The Sources of International Law
Creating Law without Government

Contents

People living in the world's democracies are accustomed to legislative bodies generating a steady flow of laws to serve the needs and wants of their populations. At the same time, the many authoritarian governments that continue to exist impose rules by whim and often enforce these rules through repression. Whether democratic or authoritarian, a hierarchical legal system is in place. An entirely different situation exists at the international level. It is a horizontal legal system. No world parliament is available to produce rules or a global dictator to provide enforcement. A large number of diverse, sovereign states create their own laws for their common needs. Given the experiences most people have had with law at the domestic level, comprehending the method of creating law at the international level can be somewhat baffling. A close look at the sources of international law will offer clarification.

Imposition of law by some sort of world government appears to be unnecessary since states are motivated to develop and comply with rules to gain the benefits of international trade, arms control, restraints on war, safer and more convenient international travel, and an improved environment, just to name a few of the worthwhile rewards accruing through international law. Although some idealists have proposed a world government, as if it might be a panacea for global troubles, such a proposal

remains anathema to most states. Joining IGOs and obeying most law most of the time, with the concomitant reduction of some sovereignty, is about as far as states will go in the present age. Once states are moved to promote their common interests through shared rules, it only remains to find a way to create these rules.

The procedure of this chapter is to identify and describe the various sources of international law. To avoid a rule-less vacuum, states over the centuries have relied heavily on customary law that emerged from common practice as well as written treaties when agreement is fairly close. States also have put principles of law to good use whenever international law begins to regulate a new international activity, before customs and treaties have taken firm control. And, as subsidiary sources for filling in gaps in the law, judicial precedents and the teachings of publicists have been helpful. The rapid expansion of the scope of international law is also covered.

Customary Law

These sources span the history of international law and are authoritatively recognized in Article 38 of the *Statute of the International Court of Justice*. Customary law has historically come first in many areas of law and will be discussed first. Treaty law often follows and confirms long-standing custom-written rules. It is true, however, that some treaties do produce norms that become customary law for states that have not ratified a given treaty. **Customary law** consists of the rules that emerge from the experiences of states over time as they try to resolve interstate problems. As the international society of states has built up, older states have socialized newer states with the rules already developed. For most states of international society, their official statements, court decisions, legislative acts, and diplomatic behavior will reflect that these states do, indeed, accept international society's customs.

Customary rules became law when there was a conviction that the expected behavior is ***opinio juris sive necessitates*** (often shortened to *opinio juris*), a legal rule that it is necessary to obey. A brief definition is that a customary rule is a general practice accepted as law. Customary law is still important today especially in the areas of state duties and rights, state immunity, and state succession. These areas have been slow to give way to written treaties that a large number of states are willing to ratify. In some areas, states are reluctant to give up the latitude of choice customary law gives them and that the written rules of treaties might take away (Byers 1999: 4).

Faith in customary law remains strong to a degree that states will sometimes challenge the written law, even the UN Charter, with arguments drawn from customary law. During Ronald Reagan's tenure as president, the United States attacked Libya in 1986 with Air Force and Navy bombers as an act of *reprisal* for Libyan terrorist attacks against US service personnel in Germany. While the Security Council of the UN is supposed to approve the use of force, reprisal, as an act of national self-enforcement, has a long history in customary law. To the Reagan administration, the customary rules on reprisal appeared to have legitimacy on a par with the written law of the UN Charter. However, if one predominate trend stands out concerning customary law, it is that many areas of international law – including the laws of the sea, war, and diplomacy – have gone through a **codification process**, becoming the written law of

Box 3.1 Article 38 of the Statute of the International Court of Justice

1 The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b international custom, as evidence of a general practice accepted as law;
   c the general principles of law recognized by civilized nations;
   d subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2 This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.

Source: This Statute can be read at http://treaties.un.org/Pages/ParticipationStatus.aspx > Chapter I.

treaties. An appreciable degree of legal consensus within international society must exist before it is possible to codify a customary rule into a written one. Even in the areas of state immunity, responsibility, succession, and rights and duties, where countries are especially cautious, some treaties and declarations have at least been promoted.

There is a solid reason why much of customary law has been codified. Christine Gray has observed that as non-European states, for instance Ethiopia, Japan, and Turkey, entered the Eurocentric international legal system, it became difficult to create new customary law satisfactory to the growing diversity of states (1983: 280). New states want new rules, and as Sir Arthur Watts has observed, customary law often lacks precision and is a slow vehicle for change (2000: 15). This problem was magnified after the Second World War when a large number of socialist and Third World states encountered the Europeanized legal system. The pressure of absorbing all these states led to multilateral conferences and the UN International Law Commission producing a considerable number of treaties for states to consider ratifying. Helping generate new treaties gave non-European states a sense of meaningful participation, insuring their support for international society in the future. Antonio Cassese is almost certainly correct in claiming that the high-water mark of customary law was the nineteenth century when about 40 European and European-settled states on other continents, such as Australia and Canada, could work out legal rules through shared experiences (2001b: 124–5).

Although international "legislating" may have shifted from customary law to an emphasis on treaty writing, customary law remains important and is often central to some important international court cases. For customary law to be seen as clearly established, several important questions are at stake: how many states must adhere, over what period of time, and with how much consistency before a custom is a firm rule of international law?

The number of states question

The 1969 *North Sea Continental Shelf* case that came before the UN's International Court of Justice (ICJ) is instructive regarding the number of states and even the amount of time needed to bolster customary law. Denmark, Germany, and the Netherlands, as adjacent countries, share the North Sea continental shelf, but there was a question as to how these three countries would divide their continental shelf into three national jurisdictions. The 1958 *Geneva Convention on the Continental Shelf*, one of four new sea treaties proposed at the time by the UN's International Law Commission, might have given guidance. Unfortunately, Germany had signed but not ratified the 1958 Geneva Convention. Germany also took note of the fact that the treaty called for a settlement based on the *equidistant principle*. Since Germany's coast is concave while Denmark and the Netherlands have moderately convex coastlines, Germany would receive a much smaller share of the shelf than if the division was simply based on shares more or less in proportion to the length of their sea coasts. The ICJ did not agree with Denmark and the Netherlands that the 1958 Geneva Convention should control the outcome. The Court recognized that the 1958 convention had come into force only in 1964 with the requisite 22 ratifications, and, by 1969, the convention could still just claim 39 state ratifications. The Court failed to agree that the 1958 convention had sufficient standing to imply a customary rule with *opinio juris* on non-participating states, namely Germany. Presumably, there was an insufficient number of states and time involved to create a customary rule for a non-adhering state. The ICJ, did, however, for the first time, substantiate the thesis that provisions in treaties can sometimes generate new norms as customary law for non-treaty states, only not in this case.[1] A treaty should have the support of a strong majority of states before the claim is made that a given treaty can imply norms applicable to the non-treaty states. For example, no one questions that the UN Charter, ratified by the vast majority of states, applies as customary law for the few states which have not joined the world body.

Since the ICJ could not find that the equidistant principle was a customary rule for Germany, the court decided that the three parties should use the *equitable principle* to divide the shelf, a legal principle drawn from many domestic practices. This principle gave Germany a larger share of the continental shelf of the North Sea than otherwise would have been the case. Interestingly, when the four 1958 conventions of the sea, recommended by the International Law Commission, were updated and integrated into the 1982 UN *Convention on the Law of the Sea* (LOS), Article 83 of the continental shelf section of the LOS called for equitable solutions and not the equidistant principle. The large majority of states have ratified the LOS with a few notable exceptions.

The time question

The traditional approach requiring a long period of time for a customary rule to take hold is underscored by the *Paquette Habana* and *Lola* case. Usually decades, if not centuries, may be involved (Malone 1998: 30). As William W. Bishop, Jr. points out, it is difficult to say exactly how much time must pass for a custom to become customary law (1989: 470).

Louis Henkin speaks of "instant" customary law and cites the well-known example of President Harry Truman's Proclamation of 1945 (1999: 470). President Truman said the United States would claim the continental shelves adjacent to the US coastlines up to a distance of 200 nautical miles and the resources these shelves might provide. President Truman did point out that the use of the sea above the

Box 3.2 The *Paquette Habana* and the *Lola* Case

Judgment delivered 1900 by the US Supreme Court (Summary and Commentary)

The *Paquette Habana* and the *Lola* were coastal fishing boats operating near the Cuban coast while flying the Spanish flag. When the Spanish–American war began in 1898, a US naval squadron intercepted and took the two fishing vessels as prizes of war. Usually a "prize" is suspected of serving the enemy in some capacity. The appropriate federal district and circuit courts upheld the seizure as a legal act of war.

The Supreme Court reversed the lower courts and returned the two fishing vessels to their owners. The majority opinion of the court included an extensive review of various states' practices regarding the status of fishing boats going back to the policy of Henry IV of England in the early fifteenth century. Over the centuries, numerous states made an exception for fishing vessels in their prize courts; thus, customary law on the matter appeared clear. Moreover, this case resorted to customary law as a source because the US Constitution, treaties, and federal law failed to address the issue at hand.

Once wireless codes could be transmitted ship to ship and ship to land, the status of fishing craft began to change. This technology was available before the First World War, although it was usually found only on major ships. In 1912, the *Titanic* teletyped for help after it struck an iceberg. By the time of the Second World War, even small fishing craft would likely have voice radio and, thus, could serve as spies for the naval forces of their country. When the famous Jimmy Doolittle mission of 1942 was approaching Japan, the American carrier equipped with B-25 medium bombers was spotted by Japanese fishing craft. The Americans sank the fishing boats as quickly as possible but had to assume the Japanese fishermen sent a radio message to Japan. For this reason, the raid was launched several hundred miles ahead of the planned launch point. The raid was an overall success, but several planes, due to the early launch, ran out of fuel and had to ditch in the sea near the coast of China, their destination.

Source: This case can be read at http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=175&invol=677, pp. 1–24.

shelf by other states would operate unaffected. Many other states in rapid succession made similar claims. Instead of objecting to the instantaneous nature of the Truman Proclamation or its content, states were all too willing to monopolize a set of nearby resources that could eventually include off-shore oil-drilling. Almost overnight a new customary law was in place. The Truman Proclamation is an extraordinary exception to the time rule in the area of customary law. Moreover, his proclamation led to efforts to put this custom into treaty form, first in the 1958 *Geneva Convention on the Continental Shelf* and then in the much broader 1982 LOS. Interestingly, the Truman Proclamation also called for use of the equitable principle instead of the equidistant principle to divide a continental shelf among adjoining states. The LOS convention finally confirmed the use of the equitable principle for dividing continental shelves as the written law of nations.

Professor Henkin also observes that when states want to change the rules quickly, rather than go through the lengthy treaty-making process, they may press for a special resolution from the UN General Assembly, known as a *declaration*. This type of resolution is designed to create new norms to guide states, as when Third World states wanted new trade rules in the 1970s. Declarations usually carry moral weight and may represent a large step toward a convention in the future. Henkin calls this process a radical innovation because it involves the purposive creation of a new norm to stand in place of a customary rule evolved through practice.[2] In the final analysis, a specific time frame for a custom to ripen into law is difficult to ascertain, but the longer the period of time, the better the chances of establishing the custom's legitimacy.

Making the same point in stronger terms, Anthony D'Amato, in an article with the title "Trashing Customary International Law," sharply criticizes the ICJ's use of a declaration to impute customary law. In the 1986 Nicaraguan case, the court made reference to the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States In Accordance with the Charter of the United Nations*. He objects to this "instant" or modern form of determining customary law as opposed to the traditional method of relying on long-term practice.[3] Another interpretation is that the court merely wanted to show that the 1970 declaration reflected the 1945 Charter prohibition against intervention and the use of force by one state against another. The United States was supporting an insurgency movement trying to overthrow a Marxist government in Nicaragua. In fact, the 1970 declaration refers to principles that have been developing for decades and are now foundational to international society and its law.

The consistency in practice question

Besides the number of states supporting a custom and the length of time in development, the consistency of state practice regarding a customary rule is important. The traditional view is that customary law is universal with all states expected to obey it. A violation now and then probably will not undermine the custom, however. Some

Box 3.3 The Asylum Case Judgments in 1950 and 1951 by the ICJ (Summary)

The Colombian ambassador in Lima, Peru, granted asylum to M. Victor Raúl Haya de la Torre, head of a political party in Peru. The ambassador allowed him to enter the Colombian embassy in 1949 following a military rebellion that the Peruvian government claimed Hoya de la Torre instigated in 1948. Asylum is recognized as regional Latin American international law, and so all that seemed to remain was for the Peruvian government to grant a safe conduct pass to Hoya de la Torre so he could leave the country.

However, the ICJ declared that Colombia was not qualified to decide unilaterally that the offense was a political one as opposed to a common crime. Thus, Peru was not obliged to regard Hoya de la Torre as a political refugee and Colombia could not under any treaty bind Peru to do so. The 1911 *Bolivarian Agreement* and the 1928 *Havana Convention on Political Asylum* did not permit unilateral assignment of refugee status. Furthermore, the 1933 *Montevideo Convention on Asylum* had not been ratified by Peru and so could not be invoked against that country. The court ruled Colombia was unable to demonstrate a constant and uniform practice of asylum as *customary American international law*. The ICJ found too many inconsistencies in asylum practices.

The ICJ was asked in what manner the issue could be resolved. The court only replied it was not part of its judicial function to end what was in effect a political situation, but did allow that Colombia was under no obligation to surrender Hoya de la Torre to Peruvian authorities. Hoya de la Torre finally left the Colombian embassy and Peru in 1954, basically as a political outcome rather than a legal one.

Source: This case can be read at http://www.icj-cij.org/ > cases > contentious cases > 1949 Asylum Case.

states have even tried to argue that a principle of *persistent objector* is valid. As a new custom is forming, some states might make a point of objecting to the rule year after year, with the intent that they are exempt from compliance with the rule. Actually, there is no solid support for the principle of persistent objector in case law or practice (Cassese 2001b: 123).

The classic case on consistency is the well-known 1950 asylum issue between Colombia and Peru. Not only does Latin America have treaties on asylum but some customary practices too. Asylum in Latin America is an excellent example of what is known as *regional international law*. Most countries around the world do not wish to to embrace asylum practices that would encourage political refugees to seek shelter in their embassies and thus stir up trouble with the countries hosting foreign embassies. Colombia tried to argue before the ICJ that even if Peru had not ratified the 1933 *Monteveido Convention on Political Asylum*, customary practice in Latin

America should control the outcome. The Court, however, found too many inconsistencies in practice to conclude that there was a clear customary law on asylum that could be applied to Peru.

A modern use for customary law

Customary law has further proven its staying power by coming to the aid of the human rights movement. Following the 1945 UN Charter's commitment to the goal of improving human rights, a spate of declarations and treaties quickly emerged, but unfortunately a sizable gap has always existed between the written rule and the actual human condition. Promoting and enforcing human rights standards in a world of sovereign states, with governments historically accustomed to treating their populations as they saw fit, is a major undertaking.

Box 3.4 The *Filartiga v. Peña-Irala* Case

Appearing in US Federal District of Eastern New York and the Second Circuit Court of Appeals, 1979–1980 (Summary and Commentary)

Seventeen-year-old Joelito Filartiga was tortured to death in 1976 at the hands of Americo Norberto Peña-Irala, the Inspector-General of Police in Ascension, Paraguay. This cruel act was aimed as a punishment for Joelito's father who opposed the government of Paraguay. Joelito's sister, Dolly Filartiga, sought asylum in the United States in 1978, only to discover Inspector Peña-Irala was living in the United States on an expired visitor's visa.

Ms Filartiga filed a civil suit for the torture and wrongful death of her brother under the 1789 *Alien Tort Claims Act*. The Federal District Court of Eastern New York refused to hear such a novel case, but on appeal to the Second Circuit Court of Appeals, the case was heard in 1979 and the decision rendered in 1980. Since Peña-Irala had been deported for overstaying his visa, a default judgment of over $10 million was awarded to Dolly Filartiga.

Awards of this kind are easier to make than to collect, and of course a criminal charge that might place Peña-Irala in prison was not at stake. At least the wall of national sovereignty was breached with the message that the way individuals are treated by their governments can be a concern elsewhere.

Sources: To read this case and interesting commentary, enter "Diana Online Human Rights Archive" in a search engine and select "cases" and then "Filartiga" ; also go to: http://www.pbs.org/wnet/justice/law_background_filartiga.html; http://www.womenontheborder.org/alien_tort.htm.

In the famous US case of *Filartiga v. Peña-Irala*, appearing in US federal courts during 1979–80, a small step was taken to protect human rights, namely, opposing the odious practice of torture through the use of customary law. This protection became possible because of something that happened almost two hundred years earlier. The first US Congress enacted the 1789 *Alien Torts Claim Act* as part of a broader judiciary act. This law allowed aliens on US soil to sue one another in a civil action for a *tort*, that is, a damage committed in violation of either the "law of nations" or a US treaty. This law probably was intended to help aliens use US courts to recover damages incurred in international waters, especially for an act of piracy. The Filartiga case argued that, by 1979, torture was as much prohibited by customary law as piracy was in 1789. The US federal courts delved into the weighty evidence of declarations, treaties, and national constitutions and reached the conclusion that a customary international law of human rights does exist, at least for the most heinous of crimes.

Moreover, following the Filartiga case, the United States confirmed jurisdiction over suits by aliens alleging torture, by passing the 1991 *Torture Victims Protection Act*. In fact, this act covers any individual victim including citizens of the United States. The United States further shored up its anti-torture stance in 1994 by ratifying the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Unfortunately, the mistreatment of terrorist suspects during President George W. Bush's tenure undermined an enviable human rights record of opposition to torture.

Treaty Law

The 1969 *Vienna Convention on the Law of Treaties* defines a **treaty** as "an international agreement concluded between states in written form and governed by international law." The 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* extends the same definition to agreements between IGOs and states or other IGOs.[4] Although the 1986 Vienna Convention awaits a few more ratifications before entering into force, IGOs have been participating in the treaty-making process for decades. The term "treaty" is usually thought of in a generic sense and so covers all agreements, whether they are called accords, conventions, charters, covenants, pacts, protocols, or statutes, along with other terms in use. These terms are synonymous with "treaty."[5]

Patterns in the use of terms

There are some interesting patterns in the use of the various terms referring to agreements but none displace the generic meaning of treaty. "Agreement" is often used to refer to regional economic trade treaties, for instance, the *North American Free Trade Agreement*. "Convention" has come into use for multilateral treaties when a large number of states, either at the regional or global level, generate treaty law. Conventions often enjoy the sponsorship of the UN or one of the specialized IGOs within the UN System.

Well-known examples are the 1969 *Vienna Convention of the Law of Treaties*, the 1982 *Convention on the Law of the Sea*, and the 1989 *Convention on the Rights of the Child*.

For founding instruments that create IGOs, "Charter" is often preferred, for example, the 1945 UN Charter and the 1952 *Charter of the Organization of American States*. However, the League of Nations, the precursor to the UN, preferred to call its foundational document the League "Covenant." Finally, a "protocol" can have several slightly different meanings but usually appears in the form of an "optional protocol," which is an add-on agreement to an existing treaty. Treaties sometimes begin as **framework treaties** with add-ons at a later date expected. Such a treaty covers the general subject-matter, which can then be elaborated with optional protocols. These protocols have a sufficiently independent character to require their own ratifications. The 1966 *Covenant on Civil and Political Rights* now has two optional protocols, which allow a sub-set of ratifying states to make deeper commitments regarding the enforcement of human rights.

The relationship of treaties and customary law

Before continuing on to other interesting aspects of treaties, some further comment on the interplay between treaties and customary law is in order. It has been mentioned before that customary law is often codified into treaty law. And reference has been made to treaties, if widely accepted, giving rise to a customary expectation for non-signatories. The most insightful observation about the treaty–custom relationship, however, may have been made by John King Gamble, Jr. About any given area of international law, he thinks there is often a long causal chain with customs and treaties alternating in a process of creating a body of law. Gamble believes the two generate each other (1998: 86–7).

Traditionally, a hierarchical difference between treaty and custom has not existed. If the two should be in conflict, the "time-rule" applies. The most recently developed rule of law prevails. The shift to an emphasis on treaty law is explained by its political popularity, not the inadequacy of customary law. At one time, customary law was general law for a Eurocentric world, while treaties were for bilateral arrangements between two states requiring a specific rule, say, for a border agreement. As mentioned before, since the Second World War, there has been a sharp rise in the population of new states wanting treaty-making conferences that can provide these states with greater influence than otherwise would be the case. Gradually, treaties have come to be seen as more definite law and, when in conflict with customary law, are usually seen as possessing more authority.

History and purpose of treaties

The history of treaties has covered three millennia, and the purpose of treaties has remained essentially the same. During the 400-year-old history of the society of states, treaties have allowed states to cooperate over an ever expanding list of subjects,

including security, trade, health, the environment, terrorism, telecommunications, and much else. Philip Allott believes states were always conscious of operating within an international society, one that was well defined by the early nineteenth century. For the benefit of this society, Allott thinks treaties performed a social function analogous to legislation in national systems (2000: 80–1). In the current time of rapid globalization, with its tightening interdependence among actors, the reliance on treaties to guide deepening patterns of cooperation has grown in importance.

Anthony D'Amato asks the interesting question of whether international law is just a grab-bag of treaties, customs, court decisions, and writings of publicists and, thereby so ramshackle as to be chaotic (1995: vii). True, international law, with treaties particularly in mind, cannot match the carefully constructed Justinian Codes of Roman times or the modern code law of present-day Germany, with their almost seamless and systematic coverage of every governable subject and issue. Nonetheless, an impressive *corpus* of international law has evolved. In every area of this law, whether concerning human rights, terrorism, diplomacy, intellectual property rights, or specialized issues of maritime law, treaties exist that constitute the basis of written law for that area. If needed, further reference can be made to customary law, principles, and court decisions when treaty law falls short. The Foreign Offices of governments and some scholars have made considerable efforts to pull together multiple volumes of *digests* of all relevant documents, involving all sources, relating to specialized areas of international law.[6]

Treaties are not just instruments for cooperation but can be tools for progress. Although law can be a conservative force and used to protect the *status quo*, reform can be the purpose of treaties. There is a growing list of conventions that call for bold change and reform. By accepting these conventions, states have been willing to provide better human rights practices, cleaner environments, and to reject weapons ranging from landmines to atomic bombs, all aimed at making a safer world for human living.

Unequal treaties

Although cooperation and progress have been the purposes of treaties, sometimes in history treaties have been used to freeze a power relationship of the strong over the weak. Treaties made in this fashion have come to be called *unequal treaties*. This term is essentially a political one and not a legal concept. The sense of injustice caused by unequal treaties, however, stings no less. At the conclusion of great wars, such as at the end of the Napoleonic Wars and the First and Second World Wars, when the dust settled and the winners and losers became clear, the treaties ending the wars appear to have confirmed new international orders (Gilpin 1984). When wars were seen as normal and as legal policy options, treaties that confirmed the loser's position seemed appropriate and were a natural element of a war-making system. A major drawback is that treaties accepted under duress may set the stage for later problems. E. H. Carr, on the eve of the Second World War, looked back at the 1919 *Versailles Treaty* forced on Germany and concluded that this unwise act contributed to German rearmament and its repudiation of the Versailles Treaty (1966: 187–8).

Few historians fail to point out that the unfairness of the Versailles Treaty was one of the major causes of the Second World War.

Unequal treaties go back to the earliest history of the state system. They were common between Europeans and indigenous peoples in the new world of the Americas, and established "spheres of influence" over the Chinese, Persian, and the Ottoman Turkish Empires. The apex of these unequal treaties might be the 1901 *Boxer Protocol* imposed after the Boxer Rebellion. European governments felt this rebellion endangered their diplomats and families living in the diplomatic quarter of Beijing, the Chinese capital. Under this humiliating protocol, the Chinese government was forced to cede full authority to foreign governments in the diplomatic section of Beijing.[7]

Since the Second World War, Third World and communist states have brought up the subject of unequal treaties at international fora, but to little avail. Western states have insisted that this problem is political in nature, and not legal. The 1969 Vienna Convention on the Law of Treaties seems to reflect the Western point of view because it omits the subject of unequal treaties. Consequently, there is no clear legal redress as in municipal law where a private contract can be invalidated if signed under duress. J. L. Brierly calls this situation a grave defect of international law and advocates full consent by all parties to a treaty (1963: 317–18).

Unequal treaties have not been a prominent issue in recent years. This good result may have come about in part because of the accumulated wisdom that unfair terms will lead to instability in the future. Also, war is no longer a legal policy option under the UN Charter, except in self-defense, so the opportunity to impose asymmetrical terms in a treaty is less available. For this reason, Louis Henkin believes the UN Charter leans toward requiring the full consent of all parties signing a treaty (1995: 29). Finally, the trend toward multi-state conference diplomacy, with a large number of states taking part, allows weaker states to use their numbers to offset the major powers' influence, including that of the United States as the world's only remaining superpower.

The breadth of treaties

Treaties, like other sources of international law, can be conceptualized as *universal*, *general*, and *particular*. *Universal* obligations involve fundamental norms or principles that are binding rules for all states, whether a given state has ratified a universal type of treaty or not. The UN Charter has universal character. For instance, the deeply invested norm of non-aggression applies to every state, and the UN Charter embodies rules about force that reflect this norm of non-aggression. The Charter applies not only to its 192 ratifying states but is also valid as customary law for the handful of small states that have not joined, as already mentioned. Further bolstering the universality of the Charter is its Article 103, which makes clear that if a treaty of any kind conflicts with the Charter, the latter prevails.

General treaties

General treaties are multi-party treaties usually involving a large number of states drawn from all regions of the world. A general treaty is likely the product of a conference

attended by diplomats from a wide range of countries and even the representatives of IGOs and NGOs. Such a conference is more democratic than a process that allows great powers to dictate rules within a small pool of states. In practice, general treaties sometimes move toward universal status. Additional states may accede to the treaty or its terms may extend to non-ratifying states as customary rules. Conventions dealing with the law of treaties, the law of the seas, genocide, and racial discrimination have arguably achieved universal status. *Particular* treaties apply to only a few states, often just two. Typical examples would be treaties calling for sharing the waters of a river as it passes through a limited number of states, regional trade agreements, or border arrangements.

Stages of treaties

A formal process exists for creating the written law of treaties, a process that may take many years. Almost a decade was needed before the 1982 UN LOS was ready for ratification, and it was 1994 before enough states ratified so the treaty could enter into force. The first stage is **negotiation.** This step is essentially a political bargaining process, whether two foreign offices are constructing a bilateral treaty or an international conference is turning out a multilateral convention. Sometimes states exchange *travaux préparatories*, or working papers that will establish each side's position and help set an agenda before a meeting takes place.

The **signature** stage requires that diplomatic representatives sign the text of the treaty as an expression of provisional consent, but the treaty is still subject to the approval of the representatives' governments. **Ratification** is the stage when the government of a state agrees to be bound by the treaty as a lawful obligation, and becomes a *party* to the treaty. The procedure for ratification can range from the signature of the country's chief executive to a more complex process involving the national legislature. Sometimes a president and prime minister, after toiling long and hard for a treaty, may face serious disappointment. President Woodrow Wilson, often called the "Father of the League of Nations," campaigned vigorously to persuade public opinion, and indirectly the Republican-controlled Senate, to accept the 1919 Versailles Treaty. President Wilson needed a two-thirds approval vote by the Senate to complete the ratification process for a treaty that would formally end the First World War and provide for the League's creation. Campaigning for the Versailles Treaty on an extensive tour by train, Wilson suffered a stroke in Oklahoma and later died. The Senate never approved the Versailles Treaty, leaving the United States outside the League. When a treaty is ratified, a state sends its *instrument of ratification* to the state serving as the *depositary*, or "keeper of records." Treaties also have to be registered with the UN, and at an earlier time, with the League of Nations.

At the time of signature or ratification, states may insist on a **reservation** about one or more articles of a treaty. In such a case, a state is saying it will be bound by all articles of the treaty except for those articles it finds objectionable. Some treaties might not ever go into force if reservations were not allowed, and yet enough reservations by a lot of states could easily vitiate the purpose of a treaty. Numerous states

insisted on reservations to the *Statute of the International Court of Justice* because they wanted to limit the situations and issues that could draw them before the world court. Compulsory jurisdiction is a jolting notion to a sovereign state, especially considering the long history of states' independence from higher authority. When reservations are allowed by the other signatories, the rule followed is that the reservation must not mitigate the fundamental purpose of the treaty. The rule derives principally from the advisory opinion of the ICJ in a case involving the 1948 *Convention on Genocide*. In their 1951, ruling, the justices allowed for reservations, but only if they were compatible with the basic purposes of the treaty.[8]

A modern trend has been for treaty-creating conferences to be cautious about allowing reservations or sometimes to prohibit them altogether. The 1966 *Convention on the Elimination of All Forms of Racial Discrimination* provided that a reservation would be unacceptable if two-thirds of the ratifying states objected to it. The United States has experienced several diplomatic defeats because of its pursuit of reservations.[9] The United States has failed to ratify the 1982 LOS, the 1997 landmine treaty, and the 1998 statute creating the International Criminal Court because its proposed reservations were seen as undermining the basic purposes of these treaties. The World Health Organization's (WHO) 2003 *Framework Convention on Tobacco Control* is an example of a multilateral treaty prohibiting all reservations without exception.

Entry into Force is the next stage of treaty-making, and it is ordinarily without controversy. Treaties normally make clear the conditions under which they enter into force as international law for the ratifying states. Usually a prescribed minimum number of ratifications are needed to make the treaty lawful. The 1948 Genocide Convention specified 20 state ratifications, the 1982 LOS required 60 ratifications, and the 1969 Vienna Convention on the Law of Treaties needed 35 ratifications.

The last major stage for a treaty is **registration**. Although states can still choose one of their ranks as *depositary*, Article 102 of the Charter requires additionally that all treaties be registered with the UN and made public. This practice started with Article 18 of the League's Covenant, which says no treaty can be considered binding until registration with the League takes place. The Charter requirement is not as strict since it permits a non-registered treaty to apply its rules without registration, but such a treaty cannot be used before any agency of the UN, including the ICJ. Both the League and UN requirements reflect the influence of President Wilson who called for treaties to be arrived at openly, believing that such public diplomacy would contribute to peace. His call for openness was an early example of transparency, which the global governance process of today tries to apply as a standard. Finally, the stages of treaty-making presented here are the bare bones of what can be a much more complex and formal process. A UN source lists 23 separate treaty actions, or stages, and makes no promise that its list is exhaustive.[10]

The hard work of negotiating treaties is basic to the problem of creating law without a central government, or world government. The story of treaties does not end with their creation, however. After a treaty enters into force, additional states, through an act of **accession,** can sign and ratify the treaty at a later date. Most members of the UN obviously have ratified the UN Charter long after its founding date of 1945 in San Francisco. Treaties often provide for an **amendment**, which might

call for a general revision of a treaty or a change in only one or two articles. Another post-ratification development is the **invalidity** of treaties which can occur but is rare. The *Vienna Convention on the Law of Treaties* provides that a treaty may become invalid for one or more signatories if a state's *internal law* for approving treaties was not followed, if a state representative *exceeded authority* in committing the state to the agreement, if an *error* occurred, as when an incorrect map is used to set a boundary line, if one state tricks another into ratifying by *fraud* or persuades by *bribes*, or if the representative of his or her state is threatened with *force*.

Interruption of treaty obligations

A more serious problem is the refusal of a state to abide by a treaty or one of its critical provisions, or unilaterally terminates its role in the treaty altogether. Trust in that particular state is gravely undermined so far as future relations are concerned on the part of other states and important IGOs like the UN. When a state performs in such a maverick manner, its action is called a **material breach**. If one state suspends or terminates a bilateral treaty, the other party is free to withdraw from the treaty if the material breach is serious. Obviously, if a multilateral treaty is at stake, the legal outcome is more complicated. After a breach by one state, the other parties to the treaty may terminate the treaty altogether or suspend treaty obligations with only the offending state. For example, if a state were to back out of an arms treaty and create a weapon of mass destruction (WMD), the remaining parties might rush to create a similar weapon for deterrence purposes. However, if a trade treaty were breached by one state, the remaining signatories would probably support the treaty as long as it helped them to prosper.

A rarely used rationale for derogation from a treaty obligation involves the legal phrase ***rebus sic stantibus***, literally meaning as long as conditions remain the same. In this situation, one party attempts to derogate by claiming a major change in the conditions on which the treaty was originally founded. The *Vienna Convention on the Law of Treaties* imposes tough standards for a country to be able to withdraw from a treaty on these grounds. One of the few cases that can be cited is the Iceland fishing case involving Great Britain. In 1961, Iceland and Britain exchanged diplomatic notes containing an agreement between the two countries that allowed Iceland to extend its territorial fishing waters beyond the traditional 3-mile territorial limit of that period to 12 miles. It is important to bear in mind that both countries count heavily on the fishing industry and have for a long time fished in much of the same waters of the North Atlantic. After agreeing to the new 12-mile limit, Britain wanted, in return, a promise that if any question arose between the two, the case would go to the ICJ. When Iceland decided unilaterally to extend its exclusive fishing jurisdiction to 50 miles, Great Britain objected and placed the case on the docket of the ICJ. Iceland asserted its action was justified by claiming substantial change in *rebus sic stantibus*. The government of Iceland maintained that more intense fishing with modern technology warranted its decision. In its 1973 ruling, the court found that it did have jurisdiction and ruled against Iceland.[11] A few years later, the British-Iceland

argument over 12- versus a 50-mile fishing jurisdiction lost its relevance when the 1982 LOS allowed for a 200-mile Exclusive Economic Zone, which covers fishing.

The Vienna Convention on treaties also recognizes **supervening impossibility of performance**, although an instance of derogation of this kind is unlikely to arise very often. If a treaty depended on a river as a boundary line but the river dried up, or an island shared by two countries' fishermen under a bilateral agreement permanently became submerged, then terms of the relevant treaty would no longer make sense and thus it could be terminated. Lastly, war can interfere with a wide-range of treaties covering the relations of two or more states at war. Most publicists have long argued, that during war, treaties are only suspended and that their terms resume once hostilities cease.

The UN and treaties

The UN, through the roles of the Sixth Committee (the legal committee), its International Law Commission, and General Assembly declarations, have helped blanket the world in international law. The UN role has been to support law that bolsters peace and strives to advance the human condition of the over six billion people sharing the planet. The last decade of the twentieth century was declared by the UN to be the *Decade of International Law*. Perhaps the best service of all the UN's efforts is the UN Treaty Collection, which has registered over 40,000 treaties. As referred to earlier, all treaties currently in force around the world are required to be in registered with the UN.[12]

Another important service came directly from the Secretary-General's office. Secretary-General Kofi Annan, beginning in 2000, in anticipation of the *Millennium Assembly for Heads of State or Government*, urged every willing state to engage more effectively in support of international law and to ratify what he called the 25 core treaties Most of these treaties were human rights-related treaties, but the list also included disarmament and environmental treaties as well. In each subsequent year of Annan's tenure, a specialized category, such as treaties on women's rights or terrorism, received priority.

The Role of Principles

A **principle** of international law is an accepted rule followed by judges, arbiters, and the diplomatic representatives of states when customs and treaties are unclear or when these two sources of laws appear to be in conflict. Principles fill in gaps left by these firmer sources of law. The formal status of principles is found in Article 38 of the *Statute of the International Court of Justice* which lists, among other sources, "principles of law recognized by civilized nations." Within the hierarchy of these sources, most legal authorities view principles as a subsidiary source, along with judicial decisions and the writings of publicists. Undoubtedly principles are expected to continue in importance as a source since they are referred to in Article 21 of the 1998 *Statute of the International Criminal Court*.

In the early development of international law, publicists had little choice but to use principles extensively, but in modern times they receive less attention due to the emergence of a substantial *corpus* of widely agreed-upon customary and treaty law. In fact, the most relied- upon principles have sometimes evolved into customary law or found a place in treaties (Cassese 2001a: 499–501). Principles are likely to be reprised whenever international society experiences a new development that requires regulation, and before firm law is in place. A poignant example involves the UN's *International Criminal Tribunal for Yugoslavia* (ICTY) which has drawn on the penal laws of the major legal systems around the world for guidance. Common usage of a legal practice in many countries has proven to be a ready source for principles accepted at the international level. For instance, the ICTY has acted more decisively on charges of rape that involved the forcible entry of the vagina or anus, but less so in cases of forced oral sex because the handling of the latter crime lacks uniformity in national legislation (2001: 48).

Principles of international law can be placed in three categories as to their origins, although these categories can overlap to some extent. First there are the principles commonly used domestically in the major legal systems of the world. The meaning accorded to the crime of rape mentioned earlier is a good example. These principles are well known and accepted by leaders and judges at the international level. As John O'Brien has observed, judges deciding international law issues have often served previously in the municipal context, and they bring their national experiences with them to the international level (O'Brien 2000: 87). The municipal, or domestic, context provides most of the principles in use at the international level. *Estoppel* is a doctrine that prevents an actor from discontinuing an established practice on which other parties have become reliant Parties should act in *good faith* concerning their promises or compliance with the law. Another domestic principle used internationally is *neo iudex in sua causa* (one should not be a judge in his or her own case). Already mentioned earlier in an international setting is *rebus sic standibus*, which refers to a possible change in conditions underpinning an agreement. To get out of the agreement, one party must demonstrate a drastic alteration of the conditions. *Res judicata* (a matter already adjudicated) is a stand most courts will take by refusing to hear a case for a second time.

Second are the principles that arise at the international level itself instead of being borrowed from municipal systems. These principles are sometimes referred to as general principles. One principle cited as an example above all others is *pacta sunt servanda*, which means that agreements must be observed. This principle is the singularly most important because the international legal system would be nearly meaningless without it. This principle's great importance is illustrated by its appearance in the preambles of both the UN Charter and 1969 Vienna Convention on the Law of Treaties. Other examples of general or international level principles are found in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States In Accordance With the Charter of the United Nations.[13] This declaration is intended to elaborate the Charter by identifying principles that states have agreed to use in their mutual relationships. These principles include refraining from the use or threat of force,

settling disputes peacefully, avoiding intervention in the affairs of other states, respecting other states' sovereign equality, and fulfilling all Charter obligations (O'Brien 2001: 91–2).

The third and final source of principles is natural law. The best-known examples are principles of equity and humanity. Equity calls for a fair settlement and can be identified with the jurisprudence of common law countries but also placed in the natural law tradition. Judges at the national and international levels have used equity decisions to prevent an injustice that might otherwise occur if laws were slavishly applied in a technical way. Judges have applied equity mostly to handle boundary and maritime issues, as in the North Seas Continental Shelf case of the ICJ. Equity decisions can be a potentially serious problem if the parties at issue, or the judges in a case, represent sharply differing political and legal cultures. Although judges of the ICJ and arbiters have on occasion used equity law, neither the ICJ nor its predecessor the Permanent Court of Justice, have applied *ex aequo et bono* (what is just and fair) provided in Article 38. This principle is similar to equity but is much more general. For this source of law to apply, both parties in a dispute must agree to its use. While there is no bright line between the two, equity calls for fairness but is rooted in norms of law and precedent. *Ex aequo et bono* is free of legal moorings (Franck 1995: 54–6).

A sense of humanity, as a social and political force, no doubt helps explain the laws of war that protect POWs and the outpouring of human rights treaties since the Second World War. Humanity considerations have also appeared in case law. The 1949 *Corfu Channel* case involved two British destroyers damaged by mines, with a heavy loss of life, off the coast of Albania in 1946 during peacetime. The destroyers should have been able to enjoy the right of "innocent passage" through the Corfu Channel, from one part of the high seas to another. The ICJ decided that Albania had an obligation to notify other countries of the minefield or at least give immediate warning to the British warships as they approached. Since the incident happened in peacetime, the court concluded, among other factors, that "elementary considerations of humanity, even more exacting in peace than in war" applied. The ICJ found Albania responsible for the damage done to the two destroyers and reserved for further deliberation the amount of compensation Albania would have to pay Great Britain.[14]

One special principle in the natural law category that deserves to be revisited is *jus cogens*, an inviolable norm states must adhere to without exception. Treaties and customary law are rendered invalid if they support or condone genocide, slavery, a war of aggression, torture, or any other reprehensible acts. The exact source of *jus cogens* is not completely clear. Most authorities discuss *jus cogens* as a development since the mid-twentieth century based on core norms representing supreme, unbreakable law (e.g. Henkin 1995: 38). Li Haopei takes note of this principle's recent attention, including its appearance in Article 53 of the Vienna Convention dealing with treaties; however, he claims it originated in the municipal law of Rome and finally reached many municipal systems of today through the writings of publicists of the seventeenth and eighteenth centuries (2001: 499–501).

Judges and Publicists

For the citizens of Australia, Great Britain, the United States, and other English-speaking countries, judges making decisions that serve as precedents is a normal expression of the *common law* tradition. The foundation of common law is ***stare decisis*** (to stand by a decision). Lower-court judges in this system would fail to receive a promotion to a higher bench if they were unable to bear in mind a long line of precedents and logically apply these precedents to a case before their bench. Sometimes the more activist judges of common law countries are accused of *making* law instead of *declaring* the meaning and application of the existing law for a given case based on a legislature's intent. Judges in the United States can even practice *judicial review*, which is a great power on the part of a court for declaring a law null and void because it conflicts with the US Constitution. Common law countries are in the minority among the world's two hundred or so states.

Most countries of the world have *civil law* systems, usually based on a heritage originating with Rome, traveling over time to the rest of Europe, and from there to other parts of the world via colonial rule. Civil law involves lengthy and elaborate codes of law similar to the Justinian Codes of Roman times. The job of civil law judges is more straight-forward than that of common law judges. These judges apply a large body of explicit law based on detailed codes to the facts of the case before them. While common law judges can reshape the meaning of legislative statutes and create case-derived precedents, civil law judges assume they have a complete body of law on hand provided by a legislative body.

The role of judges and arbiters dealing with international law does not match exactly either the work of common or civil law judges; rather, judicial decision-making at the international level is *sui generis* (of its own kind). Article 59 of the *Statute of the International Court of Justice* appears to repudiate completely *stare decisis* of the common law tradition when it states, "The decision of the Court has no binding force except between the parties and in respect of that particular case." And certainly no elaborate codes associated with civil law are on hand for the justices of the ICJ. They are left to search among treaties, customs, and principles of law to find a basis for a sound decision. The justices do not always succeed at this task, however.

When a dispute arises or a crime has been committed, any court is loath to admit it cannot find appropriate law, but in at least one case the ICJ had trouble determining the law. In a 1996 case about the legitimacy of nuclear weapons, the UN General Assembly asked the ICJ for an advisory opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The ICJ searched through the areas of human rights, environmental, and armed conflict law, but still could not provide a definitive answer, not even on the question of nuclear weapons' use in self-defense. The Court appeared hamstrung on this issue, unable to be decisive after reviewing a wide assortment of legal sources. The ICJ had to turn to a series of UN General Assembly resolutions which "declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity."[15]

In practice, the ICJ, as well as other international courts, does pay some attention to their own prior decisions and the judgments of other international and, even national, courts. Richard B. Lillich and Daniel B. Magraw claim that trying to block out precedents in international law is like trying to stop the wind (1998: 36–7). When the ICJ, for instance, offered an advisory opinion in the 1949 Reparations for Injuries case, it established the precedent that IGOs can empower themselves sufficiently enough to fulfill the goals of their treaties of creation, a precedent that from then on would be available to other courts and international organizations besides the UN. Other examples of ICJ precedent-setting decisions easily come to mind. The 1951 genocide case helped clarify how reservations to treaties would be handled in the future. And the 1970 *Barcelona Traction* case largely defined the nationality of corporations, while the 1950 asylum and 1969 North Sea Continental Shelf cases contributed some understanding to the relationship between customary and treaty law. Finally, the UN International Tribunal for Rwanda in 1998 established the precedent that rape can be construed as a war crime rather than merely an ordinary criminal act committed by an individual. History contains many examples of the systematic use of rape as an adjunct to waging war, but, until recently, has been a neglected prosecutorial issue.

Bing Bing Jia offers a clear-eyed perspective about international courts and precedents. Writing about judicial decisions in the context of international criminal tribunals, he sees precedents as "persuasive" to judges rather than serving as "binding authority." He notes that Article 21 of the 1998 *Statute of the International Criminal Court of Justice* allows justices of this court to look at previous decisions, but that the same article regards judicial decisions as subsidiary (Bing Bing Jia 2001: 83–95). John O'Brien offers an interesting insight about the *Statute of the International Court of Justice*, which downplays the use of precedents. He opines that judicial decisions have had more influence on the evolution of international law than the creators of the Statute in 1921 could have ever imagined (O'Brien 2001: 94). The Statute served the Permanent Court of Justice, associated with the League of Nations, before coming into use by the ICJ as a major organ of the UN. Amidst a proliferation of international courts and tribunals in recent years, judges undoubtedly are aware of prior decisions by their own court as well as the judgments handed down by other judicial bodies. However, as Anne-Marie Slaughter goes on to point out, the world falls far short of a unified legal system headed by a top world court that can impose global uniformity on lower-levels of courts (Slaughter 1997: 186–9).

In addition to principles and judicial decisions, publicists' writings are another source clearly identified as a subsidiary source of international law. The years of profound dependence on publicists coincide with the lives of such noteworthy writers as Grotius, Pufendorf, and Vattel. Although burgeoning customary and treaty law have mostly eclipsed the role of publicists, they are still useful today. Publicists delve into subjects at great depth and pull together all the fragments of treaty law, customs, and court decisions into a meaningful whole. Gerhard von Glahn cites Ramphaël Lemkin's *Axis Rule in Occupied Europe* (1944) as contributing materially to the framing of the UN *Convention on Genocide* in the aftermath of the Second World War. Lemkin even coined the term "genocide," meaning the killing of a tribe or nation of people, as Adolf Hitler's Nazi Germany attempted to do to the Jewish community of Europe.[16]

Another way publicists provide a service to international law today is to take on **moot issues**, or theoretical questions, and offer suggestions as to how the law can deal effectively with a problem. Much of outer space law had been written, partly under the influence of publicists, before many states could even clear the Earth's atmosphere with their rockets, satellites, and crewed vehicles. Only the Soviet Union and the United States had the rockets to place a small number of satellites into orbit when the core space law, the 1967 *Outer Space Treaty*, was offered for ratification.

The academic spade work of publicists may happen as the result of individual efforts, like that of Lemkin's work on genocide, or it may be the product of a body of scholars. Several well-known academies of international law publicists exist, including the American Law Institute, *L'Institut de Droit International*, the Hague Academy of International Law, and the International Law Association, which has 50 national branches. Deserving special attention is the UN International Law Commission (ILC). While the other academies are private, the ILC is a public body since it is an organ of an IGO. The ILC has helped propose a number of conventions opened for ratification by states.

Other Sources

The formal sources of Article 38 have been covered, but it is necessary to identify a few less explicit ones. These sources do not have the binding nature of *opinio juris*, nonetheless, states are inclined to respect them. One such source is **comity**, which consists mainly of courtesies that surround diplomatic intercourse. If one side offers supporting evidence to clarify a position before negotiation begins, then the other side can be expected to reciprocate. Or, if one state sends a diplomatic note to another, the sending state should not make its contents public until the receiving state has had a chance to read it. Then there are *memoranda of understanding*, which are usually technical rules produced by two states' bureaucracies to handle common interests regarding commodity trades, antitrust laws, or such concerns as environmental damages and health issues (Slaughter 1997: 189–92). More broadly, the 1975 *Helsinki Agreements* provided a basis of understanding on how the East and West would deal with each other during the great Cold War divide.

There are several instances of *unilateral pronouncements* by a state serving as binding law. The best known is the 1973 announcement by France that it was going to conduct nuclear atmospheric tests in 1974 in French Polynesia, but after that date would cease such tests altogether. The ICJ regarded as binding France's unilateral pronouncement in the 1974 *Nuclear Tests Cases*. Australia and New Zealand brought the case in objection to nuclear radiation in proximity of their countries.

Even a famous case of a binding *oral agreement* has occurred. Denmark and Norway have disputed over the possession of Greenland, especially the more habitable eastern coast, since 1819. In 1919, the Norwegian Minister of Foreign affairs asserted to a Danish diplomat that Norway would no longer object if Denmark claimed all of Greenland. The dispute, nonetheless, arose once more, going before the Permanent Court of International Justice in 1933. The Permanent Court found

in Denmark's favor. A written record of the conversation between the Norwegian foreign minister and the Danish diplomat proved to be Norway's undoing.

Finally, there is a source some scholars speak of as *soft law*, which essentially refers to resolutions or declarations of intended policies by a body of states. Declarations are resolutions that carry considerable moral weight and may call for bold policy changes. The Third World tried to change the world economy to their liking with UN General Assembly declarations. These declarations are neither lawful nor mere political statements, but something in between. The UN General Assembly has issued a goodly number of declarations in different policy areas. Multilateral conferences sometimes turn out declarations as well as treaties, usually because the politics surrounding the conference will permit only this lower level of agreement. Then, there are policy agendas for states to follow that emerge from multilateral conferences. A well-known example is *Agenda 21* for promoting the health of the planet that stemmed from the 1992 *Earth Summit*.[17] *Codes of conduct*, encouraged by the UN and NGOs for MNCs to follow as ethical guidelines, are another variant of soft law. Soft law is sometimes referred to as ***lex ferenda***, as "law in the making" or "law as it should be." This law is usually contrasted with ***lex lata***, or law as it exists.

The Scope of International Law

The **scope** of international law is the range of subjects regulated by international rules. The simplest way to indicate the breadth of this scope is to point out that virtually every issue that receives the attention of municipal law sooner or later is regulated at the international level. The fast pace of globalization has left international law scrambling to catch up with all sorts of new human activities spilling across borders.

A traditional way of analyzing the scope of international law is to distinguish between **public international law** and **private international law**. The public side of international law primarily deals with the duties and rights of states and IGOs. Typical public laws are found in the areas of diplomacy, state succession, war, intervention, and various issues of jurisdiction relating to air space, territorial waters, and land territory. Private international law focuses on private individuals and groups as their activities cross national boundary lines, producing effects on two or more countries. The distinction between public and private international law is gradually blurring. As early as 1963, Wolfgang Friedmann claimed that many activities once taken to belong to the private sphere have become a matter of public concern, drawing the attention of governments and IGOs. Friedmann stated that, "There is today [1963] hardly any field of private law which could be adequately understood without a strong and often decisive admixture of public law" (1963: 279–99). Treaties as public law are increasingly absorbing private activities for regulation on everything from transnational business to the protection of children in custody and adoption cases (Bozeman 1994: 206). One of Hilary Clinton's early tasks in 2009, as Secretary of State, has been to champion the cause of an American father who has for several years sought his son's return from Brazil.

There are ongoing meetings from time to time of the Hague Conference on Private International Law that has held sessions since 1893. Numerous conventions among

states regulating private lives on a transnational basis have been produced by the Hague Conference, for instance, the 1980 *Convention on the Civil Aspects of International Child Abduction* and the 1993 *Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption*.[18]

Another broad division made in international law is *global* versus *regional* law. The UN Charter, numerous other multilateral treaties, declarations, principles such as *jus cogens*, and other types of rules have multiplied rapidly at the global level, especially since the Second World War. Additionally, developments at the regional level have been equally robust. Africa, the Middle East, Europe, Latin America, and Southeast Asia, among other regions, have designed treaties, as well as IGOs, they believe meet their special needs.

A third and final broad distinction is between the *laws of war* and the *laws of peace*, with the *laws of neutrality* closely involved. For once war has begun, the relations of two or more states change dramatically. For example, foreign nationals belonging to enemy countries can be interned, members of the other side's military can be shot on sight or held as POWs until hostilities cease, and foreign property of the enemy, such as ships, can be seized and employed in the war effort. Trade, foreign assets in banks, and other economic properties become frozen until the war is over. Neutrals should have complete freedom to move cargo ships and planes in and out of warring parties' harbors and skies, but the practicality of entering a zone of conflict has always been a treacherous undertaking. The traditional night and day difference between war and peace has broken down in recent times since security issues often turn on terrorist activities. This kind of conflict operates in twilight of neither peace nor war, as traditionally understood.

Since the end of the Second World War, the focus of international law has been on a spate of issues that requires the world to busy itself with more regulation for the good of all. Challenging international law's capacity to keep up with the demand load, among a growing list of concerns, are outer space, intellectual property theft, transnational drug gangs, corruption in business, the regulation of telecommunications, a rising level of travel by ships and planes, the protection of human rights and the environment, health issues, the spread of missiles and weapons of mass destruction, and even the development of international sports law. The scope of international law can be regarded as boundless. This law will probably expand on a parallel course with the most modern countries as the two levels cope with many of the same problems.

Chapter Summary

- Since the earliest state system development, customary rules emerged among states as these actors worked through problems and established solutions as precedents.
- Treaties are agreements, usually written, that date from ancient times but have grown in importance as products of modern multilateral conferences which are made possible by rapid travel and communication.

- Principles of law are used to fill in when customs or treaties do not provide sufficient rules and are often drawn from the domestic experiences of states.
- Formally the decisions of judges rank at the bottom rung of the hierarchy of sources of law, but the growth of courts and tribunals can only highlight the importance of judicial decision-making.
- The writings of publicists have lost ground as a source of law, but their research and writing still have some influence as new problems in law are encountered.
- The scope of international law covers almost every subject that states deal with in their municipal or domestic context.

Discussion Questions

1 Based on Article 38 of the Statute of the International Court of Justice, what are the four levels/sources of international law?
2 Despite considerable emphasis by some international law scholars on court cases and precedents, can an argument be made that treaty law is the most important source of international law?
3 What are unequal treaties and are they as likely to occur in modern times as they have in the past?
4 When principles of international law are emphasized from what sources are they drawn and what is their role?
5 Within the scope of international law, what is meant by private international law and is it diminishing or increasing in importance? Why?

Useful Weblinks

http://untreaty.un.org/
The official site of the UN Treaty Series (UNTS) contains over 40,000 treaties. This site has many offerings, including "Photographs of Signature Ceremonies," a "United Nations Treaty Series Index," and "Treaty Reference Guid," with an overview of key terms related to treaties. Access to the treaties can require a subscription.

http://www.state.gov/www/global/legal_affairs/tifindex.html
This is a site of the US Department of State. Available is a list of the treaties and other agreements of the United States that are in force as of January 1, 2000. The index is alphabetized based on the country or IGO name.

http://www.questia.com/popularSearches/customary_law.jsp
This site offers online books and journal, magazine and newspaper articles. One section available is on customary law. A "search tool" for the library is offered. Reading the material is by subscription.

http://repositories.cdlib.org/blewp/art96/
A site provided by the University of California, Berkeley, offering free the paper, "Stability and Change in International Customary Law" by Vincy Fon and Francesco Parisi. The paper is a PDF file, 154k.

http://www.un.org/law/ilc/index.htm
This site is the homepage of the International Law Commission, a public body of publicists. This site offers information on "Membership," "Program of Work," "Conventions and Other Texts," as well as other options, including related web sites.

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Notes

1 D'Amato 1970: 894–5. The North Sea Continental Shelf case can be read at http://www.icj-cij.org/ > cases > contentious cases > 1967 North Sea Continental Shelf.
2 Henkin 1995: 37. Also see Presidential Proclamation No. 2667 issued September 28, 1945 at http://www.oceanlaw.net/texts/truman1.htm
3 D'Amato 1987: 101–5. The Declaration can be read in Brownlie 1995: 36–45. Or refer to http://www.un.org/ > main bodies > General Assembly > Quick Links > Resolutions > Archives > Resolutions > 25th – 1970.
4 Both conventions on treaties can be found at http://treaties.un.org/Pages/PartyicipationStatus.aspx > Chapter XXIII.
5 These specialized examples of "treaty" and other terms are found at http://untreaty.un.org/english/guide.asp, pp. 3–12.
6 On this point, see Joyner 1998: 259–60. A good example is Weston 2000.

7 "Unequal Treaties," *Encyclopedia of Public International Law* 1984: vol. 7, 514–
8 http://www.icj-cij.org/ > cases > advisory proceedings > 1950 Reservations to the Convention on Genocide.
9 For an interesting article on the United States and treaty reservations,see Frederic L. Kirgis, "Reservations to Treaties and United States Practice," American Society of International Law (May 2003) http://www.asil.org/insights/ pp. 1–3.
10 See, http://untreaty.un.org/english/guide.asp pp. 6–12.
11 This case can be found at http://icj-cij.org/ cases > contentious cases > 1972 Fisheries Jurisdiction.
12 The treaty collection homepage is at http://untreaty.un.org/.
13 This Declaration can be read by using the citations in note 3.
14 This case can be read at http://www.icj.org/ > cases > contentious cases > 1947 Corfu Channel Case.
15 To read this case, see http://www.icj.org/ > Cases > Advisory proceedings > 1996 Legality of the Threat or Use of Nuclear Weapons.
16 von Glahn 1996: 20. See note 13 for a reference to Raphaël Lemkin's work.
17 An interesting article on "soft law" is by Chinkin 1989: 850–66.
18 Thisconference'sactivitiescanbefoundathttp://www.hcch.net/index_en.php?act=home.splash > conventions.