Public International Law: An Anchor in Shifting Sands

Fred L. Morrison*

Public international law provides an anchor in the sands of international relations between States. It regulates their interactions, moderates their conflicts, and resolves their controversies. It creates mutual expectations that form the basis for international peace and security. This modern international law system is based on concepts founded in a long history of customary and conventional law,[1] now articulated in the Charter of the United Nations. Its formative principles called for recognition of the "territorial integrity" and "political independence" of recognized States.[2] Its security concepts were based on collective security,[3] and, if necessary, on individual and collective self-defense.[4] It assumes that member nation states would control all other actors—individuals and groups.

Over the past sixty years the United Nations has had a remarkable record of improving world security in fields such as human rights, environmental protection, and the codification of international law.[5] It has witnessed the expansion of the international community of states from 39 Charter signatories to nearly 200 member States today.[6]

International law is not, however, an immutable body of rules. It is a living system. Like all living systems, it reacts to its

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* Popham Haik Schnobrich/Lindquist & Vennum Professor of Law, University of Minnesota Law School. The author wishes to thank Nathaniel Gross, University of Minnesota law student, for assistance in the research for this Essay.

1. Statute of the International Court of Justice, art. 38., June 26, 1945, 59 Stat. 1055 (entered into force Oct. 24, 1945).

2. U.N. CHARTER art. 2, para. 4.

3. *Id.* arts. 39-49.

4. *Id.* art. 51.

5. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200, 999 U.N.T.S. 171; Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, princ. 21, U.N. Doc. A/CONF.48/14/Rev 1, 11 I.L.M. 1416; CODIFICATION DIV., U.N., THE UNITED NATIONS AND THE DEVELOPMENT OF INTERNATIONAL LAW, http://www.un.org/law/1990-1999/index.html (last modified Nov. 19, 2002).

6. For a list of signatories to the U.N. Charter, see Press Release, United Nations, List of Member States, http://www.un.org/Overview/unmember.html (last modified Apr. 24, 2003).

environment. The international legal order has responded remarkably to the changes of the past half century. It has responded to a concern for human rights first in declarations,[7] then in treaties and conventions binding on ratifying signatories,[8] and finally in the growing consensus that minimum standards of human rights have become customary international law.[9] Part of that change, as exemplified by treaties and conventions, has been formal and within the constitutive rules of the international system. Other changes have resulted from "pushing the envelope" of rules of recognition of new international norms, essentially creating a new *Grundnorm*, or basic validating rule for international law.[10]

The law governing international trade and finance exhibits a similar range of development. From a near anarchy regarding trade and finance, the States of the world created the International Monetary Fund (IMF),[11] the World Bank,[12] and the General Agreement on Tariffs and Trade (GATT) system[13] in the late 1940s. They have created an orderly system, but not a fixed order. By the 1970s, the International Monetary Fund had to respond to economic and political forces that had ruptured the fixed exchange rate system conceived in Bretton Woods and new structures had to be established.[14] Those new structures emerged

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7. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III)A, U.N. GAOR, 3d Sess., at 73, U.N. Doc. A/810 (1948).

8. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200, 999 U.N.T.S. 171. See also the more specialized agreements such as the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, G.A. Res. 2106 (XX), 660 U.N.T.S. 195; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 20378, 1249 U.N.T.S. 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, G.A. Res. 24841, 1465 U.N.T.S. 85; and the Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

9. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia, Herzegovina v. Yugoslavia) 1993 I.C.J. 325 (Sept. 13).

10. *See, e.g.*, Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (documenting International Court of Justice's use of the U.N. Charter as evidence of customary international law).

11. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 29.

12. Articles of Agreement of the International Bank of Reconstruction and Development, Dec. 20, 1945, 60 Stat. 1440, 2 U.N.T.S. 134.

13. General Agreement on Tariffs and Trade, Jan. 1, 1948, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

14. Amendment of Articles of Agreement of the International Monetary Fund, July 28, 1969, T.I.A.S. No. 6748, 20 U.S.T. 2775.

in response to the changed facts of global economic life.[15] To remain within the changed realities of the world, the original organization and its rules had to change. If the IMF had insisted on compliance with the specific terms of its organic instrument, the IMF would have become irrelevant to reality and eventually extinct.

The present turmoil of the World Trade Organization reflects the same forces. For more than forty years the law of international trade was a series of explicit economic "bargains,"[16] continually subject to revision, reinterpretation, and occasional non-compliance. Its evolution into an increasingly formal body of binding rules and formal dispute resolution systems may have taken place before the participating actors were ready to make the necessary transformations in their own approaches to these questions.

International law has always evolved to cope with the environment in which it operates. The clearest statement of this evolution is to be found in the work of Grewe, *Epochs of International Law*.[17] A diplomat and scholar, Grewe traces the changes in perception in the legal order through a dozen different epochs from the Sixteenth Century to the Twentieth Century.[18] A feudal world had a code of international norms that was appropriate to and influenced by the economic and political realities and rivalries of its time.[19] In another era, the claims of the legal order were appropriate to the balance of power of that era, and the rules of the system reflected that fact.[20]

Grewe recognizes that international law is fluid. It responds to the political environment in which it exists. Although the changes in the rules and expectations between epochs may be fundamental, and even the *Grundnorm* of the system may change, there is never a complete repudiation of the previous system, only a reinterpretation of it. Some earlier norms are reinterpreted,

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15. *See generally* KENNETH W. DAM, THE RULES OF THE GAME: REFORM AND EVOLUTION IN THE INTERNATIONAL MONETARY SYSTEM (1982).

16. Robert E. Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1302-04 (1971).

17. WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (Michael Byers trans., Walter de Gruyter 2d ed. 2000) (identifying two epochs of international law in the twentieth century: an interwar period from 1918-1945 and a post-World War II system based on the U.N. Charter).

18. *See generally id.* The introductions to each of the twelve epochs serve as examples of evolution in legal order from the Sixteenth Century to the Twentieth Century. *Id.*

19. *See id.* at 29-31.

20. *See id.*

while others quietly become irrelevant. New expectations of State conduct arise. To take just one example, in the seventeenth and eighteenth centuries the presence of a legitimate royal Head of State was a precondition to membership in the order of States.[21] With the emergence of the United States and republican France at the end of that period, the requirement of royal legitimacy, which had been a bulwark of the old order, ceased to have real relevance—any Head of State sufficed.[22] The earlier requirement of royalty was never repealed; it was simply denied.[23]

The final era that Grewe described, the international system of 1945-1990, can be described in two ways: first, as it was originally intended;[24] and second, how it operated in fact.[25] Before his death, Grewe recognized that, with the close of the Cold War, that system was coming to an end and a new era would appear.[26] He was able to make only some very preliminary efforts at identifying what would follow.

How was the system of 1945-1990, the system we commonly call "international law," supposed to work? As planned by its framers, the system of the Charter largely confined protection of international security to the major powers—the five permanent members of the Security Council.[27] This is confirmed not only by Article Thirty-nine of the Charter, which affirmatively gave the power to the Council,[28] but by other provisions of the Charter as well. For example, the General Assembly was prohibited from even debating security issues,[29] regional organizations could only act with Security Council approval,[30] and the Secretary-General had a weak position.[31] The real purpose of this structure was to permit the major powers to recognize and stop any dispute among minor powers that could blossom into another world war, but to leave "hands off" of conflicts among the major powers themselves.[32]

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21. *See id.*
22. *See id.*
23. *E.g., id.*
24. *See infra* notes 26-31 and accompanying text.
25. *See infra* notes 32-38 and accompanying text.
26. *See* GREWE, *supra* note 17, at 715.
27. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 128 (6th ed. 1992).
28. U.N. CHARTER art. 39.
29. *Id.* art. 12.
30. *Id.* arts. 52-53.
31. *Id.* arts. 98-99.
32. *See* GREWE, *supra* note 17, at 645-46, 697-98.

Two critical assumptions formed the basis of that structure: first, States, and only States, were significant actors in the international system;[33] second, a balance of power required the States to act in concert.[34] The outbreak of the Cold War put those assumptions to the test. The exigencies of the circumstances required reinterpretation of Charter provisions to maintain a functioning international order. So, despite the clear language of the Charter requiring an "affirmative vote" of every permanent member of the Security Council for actions under Chapter VI,[35] that body successfully claimed to have authority even when one of the permanent members did not in fact cast an affirmative vote, but merely abstained or was absent.[36] Despite the clear commitment of all authority over peace and security, the General Assembly adopted the Uniting for Peace resolution,[37] claiming for itself at least some authority in this field. And the second Secretary General, Dag Hammerskjold, expanded his own authority and presence into the vacuum left by the stalemate of the Cold War.[38] These interpretations are commonly lauded today as measures of liberal interpretation that saved the organization from the strictures of its organic law.[39] But they are, indeed, interpretations or evolutions of the international legal order.

These examples are provided to show that the law is and must be malleable. Even the law of 1945 was interpreted to make it suitable to a Cold War world. A static system in the early 1950s would have doomed the United Nations to failure. International law must accommodate itself to changing circumstances, and can do so only through progressive interpretation.

The Cold War was a bipolar time, a time in which mutually assured destruction preserved a balance of terror. But it was also a time of great stability. The two competing powers knew their mutual limits. They pressed thus far—and no farther. And each of the superpowers could control or influence the activities of their allies (or client States) to assure that the bounds thus described

33. *See* Statute of the International Court of Justice, art. 34., June 26, 1945, 59 Stat. 1055 (entered into force Oct. 24, 1945).

34. *See* STEPHEN RYAN, THE UNITED NATIONS AND INTERNATIONAL POLITICS 30-31 (2000).

35. U.N. CHARTER art. 27, para. 2.

36. John Quigley, *The United Nations Security Council: Promethean Protector or Helpless Hostage*, 35 TEX. INT'L L.J. 129, 164 (2000).

37. G.A. Res. 377(V), U.N. GAOR, U.N. Doc. A/RES/377(v) A (1950).

38. *See generally* RYAN, *supra* note 34, at 63-70 (chronicling Hammerskjold's tenure as Secretary General).

39. *Id.* at 70.

were not exceeded.[40]

With the collapse of the Soviet Union, the Cold War ended. The world breathed a sigh of relief because the threat of a nuclear holocaust seemed to have been abated. But while the international community celebrated, the fundamental assumptions upon which the entire superstructure of international law of the latter half of the twentieth century had been built also crumbled.[41] States ceased to be the sole formulators of international relations, and the number of actors capable of major international mischief suddenly multiplied.[42] With that change, much of the foundation for the received learning of the international law of the previous century also failed. The world no longer consisted only of state actors; other entities had an increasing presence in the international community. And individual actors, States or not, had tremendous power to alter the course of events through the A-B-C weapons—atomic, biological, and chemical—the fabled "weapons of mass destruction." These actors could dissolve any semblance of order created by the international system.

Let me address these points one at a time. First, I turn to the rise of non-State actors. The premise that only States were relevant actors, and that all international problems could be resolved by interactions of State entities, served as the basis of the traditional international legal order.[43] In 1900 or 1950 that was probably true. There were no real transnational economic or military activities of any significance. The only significant transnational political movement was international communism,[44] which after 1918 became so dominated by the Soviet Union that it conformed to the model of State-directed activities. Although communism and the Soviet Union were formally distinct, the State system, through the influence of the Soviet Union, could control the activities of the international communist movement.[45]

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40. The Cuban Missile Crisis provides the best example of this brinksmanship and the diplomatic maneuvering of the two superpowers.

41. *See* GREWE, *supra* note 17, at 701-03.

42. Examples of such groups include the Mujahadeen in Afghanistan, other middle-east terrorist groups, rebels in El Salvador, drug cartels in South Africa, and also the rise of multinational corporations that no longer are clearly subject to the control of a single state.

43. *See* Statute of the International Court of Justice, June 26, 1945, art. 34, 59 Stat. 1055, 1058 (entered into force Oct. 24, 1945) (stating the traditional view).

44. Although fascism was also an international movement, it was more closely identified with its State sponsors, Germany and Italy, than communism was identified to the Soviet Union.

45. *See, e.g.*, VON GLAHN, *supra* note 27, at 171-72 (discussing Soviet Union's

By 2000 this was no longer true. States were simply no longer capable of exercising the kind of control they once did. To start with a relatively benign example, no single nation State can now effectively control the activities of the largest transnational corporations. In the 1950s, the General Motors' President said, "[w]hat's good for the United States is good for General Motors."[46] It was an U.S. company, with U.S. goals. Today's Daimler-Chrysler is a much more ambiguous entity. Whatever its formal legal structure, it is an economic actor in the international arena, controlled mostly by its economic situation and the financial markets.[47] Neither the United States nor Germany nor the European Union can fully exercise control over it. Daimler-Chrysler can shift production and activities among its many sites to achieve maximum financial return.

More importantly, in the political area, States are no longer capable of controlling activities within their borders sufficiently to preserve international security. On one hand, we see a range of States that are so weak, corrupt, or ineffectual that they cannot or will not control aberrant action.[48] On the other, a revolution in transportation and communication have deprived the State of the effective tools to control individual and collective activity. So we see the growth of political ideologies and movements that are not centered in one particular state. Al-Qaida is the best known example of this issue. It is a multi-national group, not controlled or controllable by any one State in the region. Yet September 11th shows us the magnitude of harm that Al-Qaida is able to inflict. A

Brezhnev Doctrine, under which the Soviet Union claimed the right to intervene when it perceived a threat to socialism in any socialist country). *See also* GREWE, *supra* note 17, at 656-57.

46. *Two Wilson Hearings Before Senate Committee on Defense Appointments,* N.Y. TIMES, Jan. 24, 1953, at 8. *See* Federal Statistical System Before the Subcommittee on Government Management, Restructuring and the District of Columbia, 104th Cong. (1997) (testimony of Vincent P. Barabba), 1997 WL 10569311 (explaing that former General Motors President Charles E. Wilson made this statement during Senate confirmation hearings for his appointment as Secretary of Defense in response to a question about his willingness to take action adverse to General Motors if the decision was in the interest of the United States.) Wilson stated that he could make such a decision and could not conceive of a conflict because "for years I thought what was good for our country was good for GM and vice versa." *Id.* This statement is often misquoted in the inverse. *Id.*

47. *See* Daimler-Chrysler, Company at a Glance, *at* http://www.daimlerchrysler.com/dccom/0,,0-5-7155-1-12898-1-0-0-0-0-8-7155-0-0-0-0-0-0,00.html (last visited Feb. 27, 2004) (summarizing Daimler-Chrysler's operations worldwide).

48. Somalia and Liberia are the most prominent examples of States that lack effective governmental structures and thus also lack the ability to control the actions of such groups.

state that limited its response to Al-Qaida to polite diplomatic notes to Yemen, or Saudi Arabia, or Afghanistan, calling for action to limits its harmful activities, would be deceiving itself in the name of maintaining a traditional international order.

The reality of Al-Qaida and the ineffectiveness of Mullah Omar's Taliban regime in Afghanistan in controlling it made the traditional State-centered system irrelevant. In order for the United States to protect its domestic security in New York, Washington, and elsewhere, it could not rely upon the government in Kabul to react. It had to react itself, and did so.

Another part of the radical change is the emergence of the "single superpower," the United States.[49] The system of the twentieth century was based upon the notion that the balance of power, or the balance of terror, between the United States and the Soviet Union would keep the peace. The structure of the United Nations and the actual conduct of international affairs reflected this notion. With the collapse of the Soviet Union, the United States emerged, at least temporarily, as the only State able to preserve world order. The United States has taken on that mantle, but with obeisance to the traditional international order. The United States justified its involvement in Kosovo in terms of a regional response, and the United Nations only validated the intervention after the fact.[50] The United States officially justified the invasion of Iraq to the United Nations as a resumption of the 1991 war in light of the failure of Saddam Hussein to comply with all of the conditions upon that armistice.[51] Thus, the United States argued that it needed no further authorization because the invasion had already been properly authorized by the Security Council.[52] These were the necessary obeisances to the traditional legal standards.

The political realities driving these decisions were not the legal niceties of the justifications, but something much more important—response to the changing political environment. The term "weapons of mass destruction" captures this change. Those weapons in the hands of a power (whether a State or a private group) could make the rest of the legal system quite irrelevant.

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49. *See* GREWE, *supra* note 17, at 701.

50. U.N. SCOR 1244, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (June 10, 1999).

51. CONG. RES. SERV., IRAQ WAR: BACKGROUND AND ISSUES OVERVIEW 37 (Apr. 15, 2003), *available at* http://usembassy.state.gov/pretoria/wwwfcr1a.pdf (last visited Feb. 27, 2004).

52. *Id.* at 37.

The "sole remaining superpower" is concerned about challenges not only to itself, but to the existing system of international relations. "Weapons of mass destruction," or large military forces, would have made Saddam Hussein's Iraq a player capable of altering the international legal and political order. Such changes would not have enhanced human rights or other goals of the international community. The recent developments with regard to Libya[53] provide additional support for this proposition, as do the continued discussions with North Korea.[54] There may be nothing more sinister here than a natural attempt to preserve the existing world order, a natural reaction of all systems.

While the United States is currently the "sole superpower," it is unlikely to remain so permanently. Other States may pass the threshold to become participants in that process. In a sense, China already is well on its way in that direction. The United States has clearly courted Chinese acquiescence in recent events,[55] and has relied upon China to take a lead in the difficult relations with North Korea.[56] New balances and equilibria will be found. When found, they will rely upon reinterpretations of the basic rules of international order that are pertinent to the new reality. International norms will remain, but they will be reinterpreted and reapplied.

At the beginning of this Essay, I said that international law is an anchor in the sands of the sea. If the winds, currents, and tide are strong, and an anchor is set in sand, it will slowly drag along the bottom. The boat will slowly move, and its point of reference will slowly change. It may drift to the shore, but it will have a "soft landing" there. If, on the other hand, an anchor is set in granite, which some might prefer, it will keep the boat in a fixed position, until the sea and wind become too great for the anchor line, whereupon the boat will suddenly break free and crash upon the rocks, shattering it to bits. An anchor set in sand is perhaps preferable.

We are seeing a process in which the changing international environment is inducing some subtle changes in the international legal order, but that order dampens and controls these changes. It is a natural part of the dynamic process called international law.

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53. *Libya Ratifies Nuclear Treaty*, WASH. POST, Jan. 15, 2004, at A18.

54. Christopher Marquis & Norimitsu Onishi, *North Korea Agrees to Resume Talks With U.S. Over Arms*, N.Y. TIMES, Feb. 4, 2004, at A4.

55. David E. Sanger, *Bush Lauds China as 'Partner' in Diplomacy*, N.Y. TIMES, Dec. 10, 2003, at A6.

56. *Id.*