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12-1-1995

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Repository Citation

Louis B. Sohn, *Sources of International Law* (1995),

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SOURCES OF INTERNATIONAL LAW

*Louis B. Sohn**

The problem we have been discussing is not a new one. Before we try to make recommendations for the future we need to take a look at the past. The crucial issue is who really makes international law. Jordan Paust told us that it would be very dangerous to leave the making of international law to states, especially where human rights are concerned. The very purpose of the law in this case is to protect individuals *against* the states. But who would make it instead? I submit that states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals. If you go to the State Department and they have a question, where do they find the answer? If they find it in Ms. Whiteman's *Digest*, they consider that they have solved the problem. If the index does not mention the issue, the smart ones look at chapter titles and try to figure out where she has hidden it. Once they discover the right place, they find a smorgasbord of alternatives, as she included everything she could find on a particular subject in one place. That way the researcher does not necessarily discover a consistent rule, but can see what options are available.

In principle, what has happened, of course, is that each generation relied on its predecessors. In the medieval times, the postglossators, such as Bartolus de Sassoferrato, looked at everything that was written before them, going back to the Roman days and beyond, whether or not it was really relevant, quoting the Bible or the Code of Justinian, or maybe even the Koran, picking out appropriate phrases, and proclaiming that this is international law as practiced by states.

Then came Vittoria, Suarez, and Grotius, and they looked at the medieval writings and said "oh, yes, those are the rules of international law on the subject." States provided the precedents, but had nothing to do with this law-crystallizing process. These "fathers of international law" were followed by a few more, such as Vattel. He found that many of these books by then became so top-heavy, so incomprehensible, that nobody wanted to use them.

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To remedy this, he wrote in more accessible French, not Latin, a clearly written book (in modern phraseology a "nutshell") on international law, which became very popular. If you look at British courts, American courts, German courts, of the nineteenth century, Vattel is always cited. Later in France, England and the United States, domestic books were written on the international law precedents as applied by that country. For instance, in the United States, Francis Wharton, John Basset Moore, Green H. Hackworth, and, as mentioned already, Marjorie M. Whiteman wrote digests of U.S. law, as did Charles Cheney Hyde in his treatise. There were also popular treatises in other countries, as Europeans trust eminent professors more than they trust courts. E.g., in England, Sir Robert Phillimore, William Edward Hall, John Westlake, and Lassa Francis Lawrence Oppenheim wrote books reflecting the British approach; and in France, P. Pradier-Fodéré, Henry Bonfils, Paul Fauchille, Georges Scelle, and Charles Rousseau wrote about French law. If there are such excellent books, is there any need to look further?

Now everybody looks back, looks at these books or their later editions, such as Lauterpacht's, or now Jennings' Oppenheim. These authors did the research; we do not have time to do any new research, as the decision-makers want instant response. In particular, this is often happening in the State Department. I was there for a year and a half as the first Counselor on International Law. One of my duties was to help people find international law if they needed help. One day, a young man came rushing to me saying, "We have invaded Laos. The Secretary just found out about it and wants to know whether there are any precedents?" I told him that there were at least two precedents.

The two I was able to give him immediately were, first, the decision of a Mixed Arbitral Tribunal after the First World War, about Germany bombing Salonica because the British were using it as a base for attacking the Turkish Straits. There was the great attempt by Churchill to close down the Mediterranean, and he disregarded Greek neutrality. The Germans did not like it, as Turkey was their ally, and they bombed Salonica, destroying some British ships, but also a part of the city. The tribunal said that because Greece violated neutrality by permitting the British to use its harbor, Greece could not complain that its harbor was bombed.

The second case happened during the Second World War. This time, the Germans captured a British ship on the high seas and, in order to take their prize back to Germany, they thought it would be safer to use the Norwegian territorial waters, as Norway was a neutral at that time. The British navy

went, however, into the territorial waters of Norway and recaptured the ship. Norway complained about it and the British said that they were sorry, but as Norway violated its neutrality by permitting Germany to use its waters to smuggle back that ship, it must suffer the consequences. The assistant to the Legal Adviser found the books quoting these cases, and, without further research, was able to say to him that there were two good cases. The Legal Adviser two days later made a speech saying, of course this is legal under international law, look at the legal history. There are two cases, and now we have a third one. This is the way international law is made, not by states, but by "silly" professors writing books, and by knowing where there is a good book on the subject. What I am trying to say is that, at most, you can say that international law is made by the legal advisers of Foreign Offices, relying sometimes on contributions of the Justice Department or other departments, and depending very much on learned authors, not on a search of archives.

By now there is also a second way, as we have discovered over the last few days, namely that courts can decide what international law is. Though, of course, if you read the courts' decisions, they did not do the original research. They read the books, and cite the books, so it really goes back to the first source. Very often the best opinions were written by professors who were appointed international arbitrators. It is only in the 19th Century that we started getting a relatively large number of international decisions on what is a very narrow part of international law, relating to the rights of foreigners, states taking away foreign property, people getting injured, etc. Foreigners with states that were willing to intervene on their behalf and to persuade the alleged violators of international law, often by force or threat of force, to at least go to a tribunal; and the tribunal then made the law.

That is the way international law was made in the 19th century. We have inherited that and we have agreed that law is made by the practice of states, i.e., by their Foreign Offices and by decisions of courts, domestic and international, collected and crystallized by professors; but we added to it a third source: treaties. As was pointed out yesterday, there are more and more treaties. Up to the end of the 19th century, these were primarily bilateral treaties. Nevertheless, many general rules developed incidentally because of the fact that States were concluding very similar, if not identical treaties, on the subjects of commerce and navigation. To these we have added treaties on investment and those treaties in a way continue the tradition of the old ones. If you look at ten American treaties, ten British treaties, or ten Swiss treaties on these subjects, practically in every aspect of

them, they say more or less the same thing. As a result, Asian and African countries started concluding similar treaties among themselves because they also wanted to protect their investments in other states. Thus, international law can be created as well by concurrent bilateral treaties.

I discovered how this process works when one of my students at the Fletcher School of Law and Diplomacy (at which I taught from time to time), who was supposed to write his doctoral dissertation under my supervision, could not decide on a subject. So, he came to me finally, and I told him that I have not seen any book analyzing the hundreds of treaties on consular relations. In addition, practically every state has a consular law. "Why don't you look at those things, and see how many common principles you can find?" Initially, he wasn't pleased with the topic, but finally prepared a big volume analyzing many treaties on the subject, and added some notes on relevant legislation and judicial decisions. As a result, the International Law Commission of the United Nations decided that the subject was ripe for codification, and the U.N. Secretariat hired him to help them prepare the materials for the Commission. That is how we got a beautiful, widely ratified convention on consular law; it was made possible because somebody was able to write a comprehensive book on international consular relations. Another source of international law was thus legitimized.

The next strange development was, of course, that states started concluding multilateral treaties. First, we had treaties in the field of communications and other technical areas, e.g., the treaties that established the Universal Postal Union, and the telegraph, telephone and radio unions which later merged into the International Telecommunication Union. The one I always liked was the Metric Union that created the sacred meter that is held someplace in Paris; against it we have to measure one we keep in the United States in order to make sure that we have a uniform measurement.

Next, thanks to the initiative of Tsar Nicholas II, the Hague Conventions codified suddenly all the law of war in a set of conventions, first in 1899, and second in 1907, and were supplemented in 1929 by the four Geneva Conventions on humanitarian law. The ambitious attempt of codification by the League of Nations in 1930 was, however, less successful and resulted in only one treaty on the law of nationality. Many other multilateral treaties were, however, concluded between the two World Wars and Manley Hudson collected them in nine thick volumes of *International Legislation*.

In the United Nations, we moved further in that direction. During the last 50 years, some 300 treaties, i.e., about six treaties per year, have been concluded under the auspices of the United Nations. In addition, other

organizations, both global and regional, have approved large numbers of multilateral treaties; the leader is the International Labor Organization which adopted recently its 150th treaty. What is the meaning and impact of this proliferation of treaties? Yesterday we struggled a little, not really in depth, with the relationship between treaties and customary law. Some are saying that these treaties are representative of the best view of the delegates of many governments on what the rule of law on a particular subject is or should be. People have trouble with distinguishing these two concepts, whether something "is" or "should be." The International Law Commission was supposed to distinguish very clearly between codifying the law that is and developing the law that should be. It refused to do it; it could not be done. States do not like to waste time; when they work hard in order to agree on a treaty, the result must be of some importance. In addition to the agreements concluded under the auspices of the United Nations, about 4,000 other treaties have been registered with the United Nations. This is more than was done in the previous 4,000 years; this sudden increase means that international law is now being made almost every day.

When the International Court started struggling with the Law of the Sea Treaty, it took a long time for the Court to act. When states first asked the Court to apply immediately the Law of the Sea being developed by the United Nations, the Court said that the U.N. Conference on the Law of the Sea had not yet agreed upon it. The Court could, of course, consider the options being discussed, but it could not yet derive a principle from them. However, a few years later, the Court said that this law was now crystallized. It was not yet ratified by anybody, in fact it was not yet signed by anybody, but the Court said it was crystallized. There was a disagreement on a separable issue of deep seabed mining, but on everything else there was a clear consensus. The lack of ratifications was not a problem. A new rule has emerged: even an unratified treaty can be applied if there was a consensus.

In an earlier case relating to the law of treaties a similar approach was taken. The International Court of Justice, the Supreme Court of the United States, and the State Department all said that the law of treaties was codified by the Vienna Convention of 1969. It was not ratified by many states, but it was a good, well-liked (except by Professor McDougal from Yale), relatively clearly written convention, and constitutes the best evidence of what the law is today. When the State Department received an inquiry from a federal court asking, "Is this really the law?", as it was told by lawyers that the United States has not yet ratified this treaty, the Department replied that

this Convention reflects customary international law which is binding on the United States. The court accepted this statement and applied it accordingly. The International Court of Justice did the same when the issue of applicability of the Law of Treaties Convention was raised in a case before it.

Another new development originated in the United Nations. The Security Council can adopt binding decisions, but the General Assembly can adopt only recommendations. In 1948 the Assembly adopted, however, a declaration. What is the difference? Recommendations are not binding, and it was argued that recommendations are about as far as the Assembly can go. Others claimed that declarations don't deal with particular disputes, but represent a common view of the state representatives of the world. (At this point, there are only one or two states staying out of the United Nations; they are not members, but they participate as observers in almost everything. Membership does not matter too much, as they only lack a vote, one of more than 180 in the Assembly. Their non-voting status does not detract from the universality of the Assembly.) This great assembly of states gets together and starts working on an issue. After several years, after many revisions taking account of everybody's views, it reaches a consensus. A law-making declaration is adopted. Unfortunately, a London professor, Bin Cheng, at one time wrote that the United Nations declarations constitute "instant" international law, which to many uninitiated politicians meant that it was adopted suddenly, without sufficient discussion, and was merely an ephemeral statement.

In reality, however, every one of these declarations was worked out over years: the Universal Declaration of Human Rights took three years before it was done; the Declaration relating to Friendly Relations took eight years; some other declarations took more than ten. What is important is that at the end of all these deliberations, an agreement was reached and was adopted by consensus. There were, however, some difficulties. In the 19th General Assembly, Russia was three years in arrears and could not vote in the Assembly. The President then said, all right, we do not vote, but I am going to declare every resolution that comes before the Assembly adopted unless somebody asks for a vote, and several important resolutions were thus adopted. Near the end of the session, however, Albania asked for a vote. The United States did not know what to do about it. It said all right, we can vote, as this is an administrative decision, not a substantive one. This idea to give up voting was soon accepted by everybody, and at each session of the General Assembly many decisions are adopted without vote.

Another dangerous situation occurred when the first Declaration on the Environment was discussed at a Stockholm conference in 1972. This was the first international conference in which the People's Republic of China participated. Its delegates came with the instructions that all their proposals must be included in the document; if the conference adopts every one of their proposals, they would accept the document. They got every one of their changes put somewhere in the document, except one of them which other delegates refused to accept. The Swedish President of the Conference announced: "All of you have seen the final draft, and I think there is a general consensus that this declaration should be adopted." The Chinese delegate waved his hand, but the President was unfortunately looking in the other direction. "I see no objections. The Declaration is now adopted. Oh, I see the Chinese delegate has something to say." The Chinese delegate simply stated that he wanted to ask for a vote, but now it was too late to ask for one; he did not request that another decision be taken.

Finally, it must be remembered that it was agreed for a long time that international law is based on the agreement or acceptance by states; the states are the masters of the house. The states can decide how they are to reach a decision on a rule of international law. When communications were bad and powers of negotiators were limited, each decision had to be taken back home and approved by the ruler. Today delegates can get a change in instructions by fax in a few minutes. The states in their wisdom decided a few years ago that international law can be adopted by consensus, if there is enough agreement. Of course, consensus is not instantaneous. Committees are established, they draft something, they send it to the states for comment, they revise it in light of these comments. If there are still a few countries that do not like something, the leaders of the conference negotiate with them until they are more or less satisfied, and by the time the consultations are finished, everybody has contributed to the final result, and it has become a truly common instrument. They have done so much work, there is no need to vote.

Sometimes states are stubborn, like the United States was with respect to the Law of the Sea. The President of the Conference, Tommy Koh, the Ambassador of Singapore, was still negotiating the last few things the United States wanted to have accepted by the developing countries, when a U.S. delegate was sent to notify him that the White House requested that negotiations be closed, and that a vote must be taken. The United States was the only one to reject the provisions on seabed mining; other objectors abstained and a few other negative votes related to different topics. This is

one of the cases where there was no success, except for the fact that the United States was not able to stay away from the convention. Under pressure from the fishing industry, President Reagan had to accept by an executive order, as "generally accepted rules of customary international law," the convention's provisions on the exclusive economic zone, and extended U.S. jurisdiction two hundred miles into the sea. Later the President had to issue a second executive order, saying that, in accordance with the Convention, the United States decided to claim a 12-mile territorial sea. In both cases the United States based its decision on the fact that these provisions, because of general consensus, have become customary.

To summarize, States can agree on international law being made in any way they wish. Once they agree on a method, the matter is over. As I have pointed out, every few years we invent a new method; there is no end to ingenuity of human beings. By the year 2000, there might be one or two more methods. We are still applying the 19th century rule that international law is made by the community of states, but in every generation the community has been able to invent new methods for crystallizing international law. We finally have accepted the principle that it is important to be able to establish new international law quickly in certain circumstances. We cannot wait any longer for the ratification by all states because it takes too long. We read recently that the Security Council adopted a resolution establishing the International Tribunal for War Crimes in Bosnia. The states agreed: we want it done, it cannot be done quickly otherwise, we don't need a treaty, a decision of the Security Council is sufficient. The tribunal's statute was drafted by the Secretary-General, the Security Council approved it, the tribunal was established. Thus, it was done, promptly and efficiently. An important international institution was established by another new method.