1996

The Sources of International Law

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What are the sources of international law? The earliest modern advocate of the law of nations, Hugo Grotius, saw the ultimate source of law in humanity's natural need for social order, discovered and constructed by human intelligence (Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625) at Prolegomena 8). Grotius observed that justice is approved, and injustice condemned, by good men everywhere (Prolegomena, 20). So he sought evidence of the law of nations in unbroken custom and the views of skilled and reflective authors throughout the ages (Grotius, I.xiv.2). Just as municipal law arises from the mutual consent of individuals seeking the good of their community, so for Grotius international law derived from the implicit consent of states, seeking the good of the international community as a whole (Prolegomena, 17).

Emmerich de Vattel also believed in national duties to the universal society of the human race (Emmerich de Vattel, *Droit des gens* (1758) at Preliminaries § 11). In the treatise that did most to promulgate the modern law of nations, Vattel sought to clarify the proper role of consent. States may create and alter some of their duties by treaty or custom, but other laws remain immutable components of the necessary law of nations. Treaties or custom contrary to these provisions are unlawful and void (Vattel, Preliminaries § 26). Vattel identified the law of nations with the law of nature, applied to nations (Preliminaries § 6). The greatest difficulty for international lawyers lies in discovering its content, which is why Vattel concluded that in making demands on other states, nations should restrict themselves to areas of general agreement (Preliminaries § 28 & III.xii.§§ 188-189).

The Statute of the International Court of Justice reflects this same tension between immutable justice and its discovery by fallible human agents. Article 38 of the Court's statute recognizes four authorities to be applied in deciding cases according to international law: international conventions; international custom; the general principles of law recognized by civilized nations; and the teachings of the most highly qualified judges and publicists. Centuries of practice had not substantially altered the insights with which modern international law began three hundred years before.

The International Community

Both Grotius and Vattel spoke of creating and preserving the "international community" as a central purpose of international law. Christian Wolf, Vattel's main source, went further in identifying a preexisting world republic or "civitas maxima" as the source of the law of nations (C. Wolff, *Jus Gentium methodo scientifica pertractatum* (1749)). Some contemporary lawyers, such as Jonathan Charney, see the public interest of this "international community" as the central source of international law, without specifying too carefully who makes up the international "community" or why its interests should be paramount. Traditional doctrine, going back to Grotius, described international law as regulating a community of states, just as municipal law regulates the separate national communities of citizens.

Vattel made the best argument for this conception of international law: "Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, -- nations composed of men, and considered as so many free persons living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights." (Vattel, Preliminaries § 18). It is an evident consequence of this liberty and independence of nations, that "all have the right to be governed as they think proper, and no state has the smallest right to interfere in the government of another" (Vattel at II.iv.§ 54). The traditional conception of the international community is of a community of states, regulating their external affairs in pursuit of justice and the common good of the nations and peoples that they represent.

More recently, a "realist" camp has arisen among some lawyers, which sees international law as a *modus vivendi* between competing sovereigns, serving their mutual interests without regard to justice or the needs of their people. This view adopts Vattel's concept of a community of states, and sees each state's consent as the sole source of "law" regarding its own international obligations. John Austin's legal positivism lent this attitude a certain respectability, by deriving all law from the will of "sovereigns," identified as the governments of individual states. This differs from traditional doctrine in emphasizing the will of states as sources of law, rather than their shared perceptions of justice or truth. But both approaches agree in recognizing the importance of states in determining the content of international law.

International Conventions

The emphasis on conventions in the Statute of the International Court of Justice, "establishing rules expressly recognized by the contesting states," follows naturally from Vattel's view of states as free and independent representatives of the peoples of the world. Treaties are the clearest possible expression of international consensus, and contract is one of the most basic components of universal natural justice. This is why so many since Grotius have endorsed his basic principle that "pacta sunt servanda" (Grotius, Prolegomena 15). If states speak for peoples then (a) their shared perceptions are likely to be true, and (b) their commitments should bind them.

To speak of treaties as binding would tend to vitiate the realist view of law as deriving from the will or consent of states. Treaties bind, under the usual doctrine, whether or not states still endorse their original agreements. There is an obvious utility in being able to rely on mutual commitments, which usually out-weighs the harm caused by respecting ill-considered or unjust agreements. As with contracts between individuals, fundamental changes in circumstances diminish the obligation of the original pact. Even brigands can accept these fundamental principles, which serve a basic human interest in planning and coordination.

There will be limits, however, to the power of treaties as sources of law if one looks beyond the pretense that states are free and equal representatives of free and equal citizens. Most states are not. Unequal treaties imposed by force do not reflect the views of the weaker party. Unjust treaties entered into by undemocratic governments do not speak for the peoples they purport to represent. There may be prudential reasons for maintaining such treaties after power changes hands, but the ultimate source of "law" is not present to make such conventions genuinely binding.

International Custom

Hugo Grotius (I.xiv.2) quoted Dio Chrysostom (*Orations*, lxxvi) for the proposition that time and custom create the law of nations. The reference in the I.C.J. Statute to international custom "as evidence of general practice accepted as law" reflects this very old observation that custom reveals a natural law proceeding from universal human characteristics (Grotius, Prolegomena 12). Vattel added that it may also reflect tacit consent, or a tacit convention between states that observe certain practices towards each other (Vattel, Preliminaries § 25). Vattel considered this sort of customary international law useful and obligatory if reasonable, but not obligatory otherwise, since nothing can oblige or authorize a state to violate the natural law of nations (Vattel, Preliminaries § 26).

Custom expresses the natural law of the community of nations because consensus naturally builds around rules made salient by the intrinsic characteristics of human nature. Where several solutions could equally provide a viable rule, custom properly determines which rule will govern future conflicts. Here again custom does not express so much the will of nations as their mutual recognition of external and preexisting norms. Custom is very good evidence of "natural law, applied to nations."

Custom need not be universal to bind states, including dissenters, when it arises from preexisting truths (the law of nature). Custom-created by states to facilitate their social and mercantile interests derives their validity from consent (Grotius, Prolegomena 40), and only bind those who benefit from the practice involved. So while it is true in a sense to say that customs, like conventions, are generally created by the international community to serve erve its own interests, the interest involved is the maintenance of social order (Grotius, Prolegomena 8) and the advantage, not of particular states, but of the whole society of states throughout the world (Grotius, Prolegomena 17).

General Principles of Law

The general principles of law recognized by civilized nations take on a special significance for scholars who want to minimize the role of states in international law. This is because they arise among "nations" (not "states") and only "civilized" nations have standing to create them. In the Statute of the International Court of Justice, these "principles" would seem to be legal maxims accepted widely in the practices of more developed legal systems. To these some would now add "proposals, reports, resolutions, treaties or protocols" debated and refined in modern multilateral forums such as the United Nations (Charney II.B).

If all interested states participate in a discussion of some area of law and reach consensus, or even substantial agreement, the standards thus generated would seem more likely correctly to reflect the social norms and justice that justify and create the law of nations than would most conventions or customs among states. The more open and self-conscious the process, the more valid the norm. Sometimes a short-term consensus will be able to generate norms that would be very difficult to achieve through gradual evolution, given the corruption and shifting self-interest of states.

This quasi-legislative process of creating general international law requires justification. Conventions and customs provide good evidence of international law because they reflect the consent and perceptions of states, which rest in turn on the consent and perceptions of their citizens and nationals. General principles of municipal law derive their validity in much the same way. Multilateral forums purporting to speak for the "international co m-munity" must offer a some such theory to justify their claim of authority. Direct democratic participation through representatives who speak for the common good offers the most compelling claim to moral accuracy and legal recognition. The smaller the democratic input, the lower the validity of the norm.

Teachings of the Publicists

Judicial decisions and the teachings of the most highly qualified publicists of various nations might seem to fail this democratic test, even as a subsidiary means of determining the rules of international law. Their persistent importance, going back to Grotius, Wolf, Pufendorf, Bynkershoek, Wheaton and the Statute of the International Court of Justice, among many other examples, reflects the weakness, incoherence, corruption and democratic illegitimacy of most states during most of the world's history. If international custom, conventions and the deliberations of multilateral bodies derive their validity from the consent or perceptions of the peoples represented, then the participation of usurping governments and egregious tyrants in creating such standards will undermine their legitimacy. This creates the void that publicists have stepped forward to fill.

What judges and publicists offer in determining the content of international law is impartiality. Without a personal stake in the outcome of international conflicts, such figures may be franker and more objective in working out the obligations that arise from the community of states, or universal human society. Their influence depends less on democratic legitimacy than on the ability to state clearly truths that, once uttered, cannot be easily suppressed. Judges and academics who owe their positions to the patronage or sufferance of

government officials will not speak or write impartially, and deserve little deference in determining the rules of international law.

It is doctrinaire nonsense to imagine that a strict system of autonomous states ever governed the creation of international law, and well-intentioned nonsense to suppose that the sources of international law have changed much in recent years. What may have changed is the efficacy of international law, and the frequency with which such sources are consulted. Claiming authority for international law has always involved assertions of truth and justice. The role of publicists may have decreased in recent years, and multilateral forums proliferated, but the sources of their authority continue as before to be the truth of their doctrines and the democratic legitimacy of those who articulate them.

Jus Cogens

The Vienna Convention on the Law of Treaties recognizes the long asserted principle of international law that (Art. 53): "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." For the purposes of the Convention, a peremptory norm of general international law ("*jus cogens*") is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." This corresponds to Vattel's category of laws that no nation may create or recognize, because they violate the laws of nature (Preliminaries § 26).

The concept of *jus cogens* denies the possibility that international law derives in any significant sense from the simple will or consent of states. As described in the treaty, however, *jus cogens* creates a new category of fundamental norms "accepted by the international community of states as a whole." This "international community" transcends individual states, and may encourage the development of multilateral forums to recognize and articulate inchoate standards of international law.

Difficulties arise in seeking to distinguish *jus cogens* from other less fundamental rules of international law, which states may restrict by agreement. The examples usually offered include prohibitions on genocide, racial discrimination, slavery, piracy, crimes against humanity, and the use of force (Ian Brownlie, *The Principles of Public International Law* (4th ed. 1990) p. 513). All concern protecting individual rights against state malfeasance, with special emphasis on protecting personal security and bodily integrity against serious violations. Most proposed elements of *jus cogens* protect what Vattel referred to as the "universal society of the human race" (Preliminaries § 11).

Erga Omnes

The "universal society of the human race" may sometimes find itself at odds with the "community of states," as is made most clear by the doctrine of *erga omnes*, advanced by theInternational Court of Justice in the Barcelona Traction Light & Power Co. Case (1970). In Barcelona Traction, the court suggested that states owe certain obligations to the "international community" as a whole. These obligations are "*erga omnes*," according to the Court, and all states have a legal interest in their protection. *Erga omnes* obligations include acts of aggression, genocide, and violations of the basic rights of the human person, such as slavery or racial discrimination. States violating these norms offend the "international community," rather than the "community of states"

Human rights have played this overarching role in international law at least since the days of that first great promoter of state sovereignty, Jean Bodin, who admitted that rulers should be replaced by outside intervention when they cease to serve the common good of the people (Jean Bodin, *Six livres de la république* II.5.609 (1576)). Vattel considered it an act of "justice and generosity" for William of Orange to protect the English against James II (Vattel, II.iv.56). However much princes and the "community of states" may

benefit from noninterference, international law has always recognized an obligation of the "international community" to liberate oppressed peoples from those that abuse them. The principles of self-determination and colonial liberation reflect this basic truth.

Attempts to confine international disputes into a purely bilateral framework ignore the principles that gave rise to international law in the first place. Certain obligations are *erga omnes* because they regard the very existence or basic justice of the international community as a whole. This is not strictly speaking a community of states, but rather a community of humanity acting through states to develop societies and protect their common good and basic freedoms. When norms are created to serve the international community, it makes sense that community as a whole should retain the right to enforce them.

Conclusion

The primary source of international law has always been the law of nature, applied to nations. Conventions, custom, legal principles and the opinions of publicists all seek to ar-ticulate this preexisting truth, or its corollaries made salient by historical circumstances. The recent turn to multilateral action through the International Law Commission and other United Nations agencies creates a new vehicle for systematizing this sort of deliberation. This is no departure, but rather a confirmation of the traditional sources of international law.

Recent scholarship by authors such as Jonathan Charney has identified some confusion in the concept of an "international community." Is it a community of persons or of states? The doctrines of *jus cogens* and *erga omnes* also straddle this delicate issue. But to justify international law its proponents have always assumed an underlying community of humanity. Grotius and Vattel supposed that the world's peoples would act through states. But states are means towards the realization of a just society, not ends in themselves.

The sources of international law in justice and the common good of humanity have not changed for centuries, since peoples first entered into commerce with their neighbors. New vehicles for discovering these realities emerge, and are useful, most recently through multilateral forums such as those provided by the United Nations. Changed circumstances should never obscure the fundamental truths on which the law of nations rests, and without which international law would lose its efficacy and moral influence on states.

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Comments on International Law Making

In his famous book, "The Twenty Year Crisis", E.H. Carr said, "the harmony of interests...is the natural assumption of a prosperous and privileged class whose members have a dominant voice in the community and are therefore naturally prone to identify its interests with their own" (at 80). Is there not something of a "harmony of interests" idea underlying Jonathan Charney's essay? I will focus in this brief comment only on the first paragraph of Professor Charney's essay while occasionally drawing on other parts of his argument.

Charney begins:"By definition general international law serves the public interest, if for no other reason, that law is directly created by the international community to serve its own interests". There is something puzzling about this sentence. Perhaps, the attempted erasure of doubt or the unexpressed presence of conflicting voices. We know that "general international law" cannot, "by definition", carry the very definitional weight attributed to it as a mere phrase. The "because" which immediately follows reveals that general international law's service in the public interest does require an explanation, a defence.