# LAW FOR A WORLD COMMUNITY

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Changes in international relations are creating a context for a new role for law. The danger of destruction through nuclear war or, increasingly, through environmental spoliation, has lent a sense of urgency to the search for new measures. The exigencies of survival require solutions that can be achieved only at a supranational level. States have shown a greater willingness to seek such solutions, and non-state actors are increasingly taking a role to bring them about.

In the process, international law is being transformed from a law between and among states to a law that includes international organizations, individual persons, corporations, and other non-state groups. It is moving from a set of negative prohibitions that sought to keep states from injuring each other by acts of violence to a set of positive obligations to preserve and improve life for all. Law is shifting from being an interstate law to a law for a world community.

In the 1980s a new factor opened greater vistas for the emergence of a world community capable of confronting the survival issues. This factor was the beginning of an end to the Cold War that had hindered international cooperation on a wide range of issues. This article examines the trend towards the creation of a world community law that is reflected in important changes that have occurred in international law to meet the survival challenge, and others that have resulted from the ending of the Cold War.

## I. The Diminution of the Cold War

Marx's criticism of capitalism introduced a split among the major powers. The implementation of that criticism in Russia, like the introduction of a free market and liberal democracy in the late eighteenth and early nineteenth centuries in Europe, divided states into two camps. Unified goals for an international community could not be achieved while that division continued. The Cold War that developed from this division kept the world community from addressing common problems in a collective fashion.

At mid-century, superpower conflict dominated international relations, with the U.S.S.R. arrayed against the United States. As

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colonial territories became independent in the 1960s and 1970s, a South-North conflict superimposed itself on the East-West. The South-North conflict in marginal ways overtook the East-West conflict, but the East-West conflict remained a prominent feature. In the United Nations Security Council, U.S.-Soviet rivalry remained a key factor, though more frequently it became the United States that was alone among the five permanent members, and therefore, exercised a veto rather than, as earlier, the U.S.S.R.

Developments in the 1980s presaged a path towards the healing of the division. The superpowers reduced the level of their mutual hostility. The initiative came from the Soviet Union, though the United States claimed that the initiative was a response to its own high levels of military spending and its use of military force during the early 1980s.

Whatever the origin, the Soviet Union espoused a revised view of East-West relations that emphasized peaceful collaboration over military preparedness.[1] Calling "confrontation" in U.S.-U.S.S.R. relations "an anomaly,"[2] the Soviet Communist Party said that the Soviet Union's relations with the West did not have to be based on class struggle.[3] Previously, it said that the Soviet government represented the proletariat, that Western governments represented the bourgeoisie, and that the two were on a collision course.[4] "The struggle of two opposing systems is no longer the tendency that defines the contemporary era," ran the revised Soviet analysis of U.S.-U.S.S.R. relations.[5]

The West responded cautiously to the initiative but eventually

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1. *See* Quigley, *Perestroika and International Law*, 82 AM. J. INT'L L. 788, 793-94 (1988).

2. M. GORBACHEV, A TIME FOR PEACE 67 (1985).

3. *Programma Kommunisticheskoi Partii Sovetskogo Soiuza: Novaia Redaktsiia, Priniata XXVII S'ezdom KPSS* [Program of the Communist Party of the Soviet Union: New Edition, adopted by the XXVII Congress of the CPSU], Pravda, Mar. 7, 1986, at 3, 7 (deleting phrase "class struggle" from definition of peaceful coexistence); M. GORBACHEV, PERESTROIKA I NOVOE MYSHLENIE DLIA NASHEI STRANY I DLIA VSEGO MIRA [Re-Structuring and the New Thinking for Our Country and for the Whole World] 150 (1987); Vereshchetin & Miullerson, *Novoe Myshlenie i Mezhdunarodnoe Pravo* [The New Thinking and International Law], 1988(3) Sov. Gos. & PRAVO [Soviet State and Law] 3, 5 (class struggle no longer a feature of peaceful coexistence).

4. On the prior view, *see* McWhinney, *Changing International Law Method and Objectives in the Era of the Soviet-Western Détente*, 59 AM. J. INT'L L. 1, 2-4 (1965); Quigley, *The New Soviet Approach to International Law*, 7 HARV. INT'L L.J. 1, 3 (1965).

5. E. Shevardnadze, Academic Conference, Ministry of Foreign Affairs of the U.S.S.R., *paraphrased in XIX Vsesoiuznaia Konferentsiia KPSS: Vneshniaia Politika i Diplomatiia* [The 19th All-Union Conference of the CPSU: Foreign Policy and Diplomacy], Izvestiia, July 27, 1988, at 4, col. 1.

put forward counter-proposals aimed at reducing tension. "[C]apitalism and communism now sit on the same side of the table facing the common threat of nuclear war," said economist John Kenneth Galbraith.[6]

Galbraith suggested that weak economic performance by both the U.S.S.R. and United States made them less formidable to each other. "Neither American capitalism nor Soviet socialism," he said, "any longer projects the image of success that once induced fear in the other country."[7] The economic power of North America and Western Europe was eroding. On the list of states with highest per capita income, Arab states occupied several positions. Japan overtook the U.S.S.R. as the second largest economy and surpassed the United States in many areas of production. "For each speech in the American Congress on the socialist threat of the Soviet Union," Galbraith said, "there are now at least ten on the economic threat of Japan."[8]

Changes in economic style in the two states may also have contributed to the change. By the 1980s, the differences in the capitalist and socialist systems that had earlier seemed so great no longer posed an insurmountable obstacle to peaceful relations. In a process of mutual emulation, capitalist states had introduced governmental regulation of the private economy, while socialist states introduced market elements and curtailed state power over society.

Soviet President Mikhail Gorbachev pointed out that Japan and West Germany became economic powers after World War II not by building up their military establishments but by avoiding military spending.[9] In the Soviet view, the U.S.S.R. needed to develop economically without the burden of heavy military expenditure.[10] Thus, it needed to reduce its military establishment and to avoid war.[11] The U.S.S.R. made radical proposals for arms control calling for the total elimination of nuclear weapons by the year 2000. It made substantial unilateral reductions in troop strength in

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6. Galbraith, *The Dynamics of Change*, HARV. MAG., Mar.-Apr. 1989, at 17, 19.

7. *Id.* at 18.

8. *Id.*

9. Gorbachev, *Oktiabr' i Perestroika: Revoliutsiia Prodolzhaetsia* [October and Re-Structuring: The Revolution Continues], Izvestiia, Nov. 3, 1987, at 2, col. 1, 4, col. 4 (report to joint session of central committee of CPSU, Supreme Soviet of U.S.S.R., Supreme Soviet of RSFSR, 70th Anniversary of October Revolution).

10. *See* Giscard d'Estaing, Nakasone & Kissinger, *East-West Relations*, 68 FOREIGN AFF. 1, 3 (1989).

11. M. GORBACHEV, *supra* note 3, at 5.

Eastern Europe.[12] NATO responded with proposals for significant reductions.[13] Arms control agreements permitted highly invasive on-site inspection.

The military blocs—NATO and the Warsaw Pact—that dominated the world's security scene in the 1960s were by the 1980s less formidable and less adversarial. China no longer sided with the U.S.S.R. Differences among the member states of the two blocs made them seem less threatening, as united action by them in a crisis could not be assured. Differences of view surfaced between member states of the Warsaw Pact. They criticized each other on human rights issues. They took differing paths of economic reform. In NATO, the United States insisted on a larger military establishment, while the European members held back. Germany emerged as a strong voice for disarmament, pressuring other NATO states to go far in the direction of the reductions called for by the U.S.S.R. The planned elimination of trade barriers within the European Economic Community (EEC) in 1992 threatened a further separation of the European NATO states from the United States, particularly as the EEC came to act as a unit not only in economic matters, but on political issues as well.

Military intervention in other states declined. The U.S.S.R. abandoned its traditional doctrine of wars of national liberation. This shift took the superpower element, to some degree, out of existing regional conflicts and might mean that other potential regional conflicts will not develop into military hostilities. In the late 1980s, the United States and the U.S.S.R. reduced the level of contention between them in a number of long-standing conflicts—in Afghanistan, Western Sahara, Cambodia and Angola. The United States has justified its own military intervention in Third World states as a counter to the U.S.S.R. If the U.S.S.R. is not widely perceived as involved in such activity, the United States will not be able to use its traditional justification. Valéry Giscard d'Estaing, Yasuhiro Nakasone, and Henry Kissinger said that the new Soviet diplomacy on arms control and regional conflicts represented "a new concept of security."[14]

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12. Keller, *Gorbachev Pledges Major Troop Cutback, Then Ends Trip, Citing Vast Soviet Quake*, N.Y. Times, Dec. 8. 1988, at A1, col. 6; *Gorbachev's U.N. Surprise: Soviet Arms Cuts*, N.Y. Times, Dec. 8, 1988, at A18, col. 1.

13. N.A.T.O., *A Comprehensive Concept of Arms Control and Disarmament*, May 30, 1989, in U.S. DEPT. OF STATE, THE NATO SUMMIT: 40 YEARS OF SUCCESS (Selected Documents No. 37).

14. Giscard d'Estaing, Nakasone & Kissinger, *supra* note 10, at 3.

The differences in domestic politics that had separated the two states has diminished as well, with the reforms initiated by the U.S.S.R. in the 1980s. A movement towards parliamentary rule with multiple political parties held the promise of eliminating a difference that had been used by the NATO states as a reason to fear an attack from the Warsaw Pact states. The U.S.S.R. undertook a major reform of its legal system under the rubric "a socialist state under the rule of law," which aimed to strengthen the role of the courts and to make the government more accountable to the citizenry.[15]

## II. New International Concerns

Gorbachev has addressed a range of survival issues. The world, he said, had become increasingly interdependent through the "internationalization of economic connections" and the technological revolution. Greater international cooperation is needed to solve critical world problems, like, "ecological danger," the "crying social problems of the developing world," the nuclear arms race, and the increasing scarcity of resources.[16] He said that an end to the arms race and East-West *rapprochement* opened the door to the possibility of dealing effectively with global survival. Foreign Minister Edward Shevardnadze said that "the struggle of two opposing systems is no longer the tendency that defines the contemporary era. At the contemporary stage what is important is the ability to increase material benefits as quickly as possible on the basis of advanced sciences and to distribute them justly, and to restore and protect the resources necessary for the survival of mankind."[17]

Collaboration came to be viewed as "the most important component" of peaceful coexistence between capitalist and socialist states.[18] The two types of states should "interact closely" in "scientific-technical, economic, and social spheres, in human relations, and in solving global problems."[19] They should pursue "common

15. Quigley, *Law Reform and the Soviet Courts*, 27 Colum. J. Transnat'l L. — (1989); Quigley, *The Soviet Union as a State Under the Rule of Law*, 23 Cornell Int'l L.J. — (1990).

16. Gorbachev, *supra* note 9, at 2, col. 1. *See also* F. Bernthal, Recognizing the Global Nature of Environmental Problems (U.S. Dep't of State, Current Policy No. 1198 (1989)).

17. E. Shevardnadze, *supra* note 5, at 4, col. 1.

18. Vereshchetin & Miullerson, *supra* note 3, at 5; *see also* Mullerson [Miullerson], *Sources of International Law: New Tendencies in Soviet Thinking*, 83 Am. J. Int'l L. 494, 495 (1989).

19. V.A. Medvedev, Member, Politburo, Communist Party of the Soviet Union, *para-*

human values."[20]

Food security came to be a problem that posed as much difficulty as military security. Malnutrition was estimated to affect thirty percent of the world's population in the 1980s.[21] The world population in the late twentieth century was expanding at a rate that yielded a doubling in only thirty-five years.[22] The highest rates of population growth were in states where chronic hunger affected large segments of the population.[23] As the world's population rose, the task of feeding its population became more difficult.[24] Large segments of the world's population became chronically underfed. Soil erosion threatened to make it impossible to provide enough food.

Economic integration may be more conducive to peace because of the interdependency it creates. States that rely on each other for basic products may not want to risk losing access to them. Further, economic exchange may yield greater understanding that reduces the likelihood of resort to war.

Ecological problems gave impetus to this development. A perception grew that ecological deterioration could threaten human survival.[25] In the 1970s oil spills from large tankers caused considerable damage, and in 1989 the spill of oil from the Exxon Valdez in Alaska caused catastrophic damage to marine and terrestrial life. In the 1980s acid rain—sulphur emissions from industry—destroyed vast forests in central Europe and North America.[26] Carbon dioxide emissions brought a warming of the atmosphere

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*phrased in Velikii Oktiabr' i Sovremennyi Mir* [Great October and the Contemporary World], Izvestiia, Dec. 10, 1987, at 5, col. 6; *see* Remnick, *New Ideologist Says West Can Teach Soviets*, Wash. Post, Oct. 6, 1988, at A1, col. 2.

20. V.A. Medvedev, *supra* note 19, at 5, col. 6; Blishchenko, *Na Puti k Sozdaniiu Novogo Mezhdunarodnogo Pravoporiadka* [On the Path Towards Creating a New International Legal Order], 1989(4) Sov. Gos. & Pravo [Soviet State and Law] 109, 110.

21. J. Dilloway, Is World Order Evolving? An Adventure Into Human Potential 19 (1986).

22. *Id.* at 7.

23. *Id.* at 39-40.

24. *See* Dong & Li, *Food Situation Stirs Worldwide Concern*, Beijing Rev. Feb. 6-12, 1989, at 18.

25. Mostafa Tolba, Executive Director, U.N. Environment Program, *cited in* J. Dilloway, *supra* note 21, at 19; Timoshenko, *Global'naia Ekologicheskaia Bezopasnost'—Mezhdunarodno-Pravovoi Aspekt* [Global Ecological Security—The International-Legal Aspect], 1989(1) Sov. Gos. & Pravo [Soviet State and Law] 84.

26. Rissburger, *On the Brink of an Ecological Calamity: Acid Rain, Transboundary Air Pollution and Environmental Law in West Germany*, 12 Syracuse J. Int'l L. & Com. 325 (1985); Scott, *The Canadian-American Problem of Acid Rain (U.S.-Canada Transboundary Resource Issues)*, 26 Nat. Res. J. 337 (1986).

called the "greenhouse effect" that threatened to alter the world climate and to render many areas uninhabitable.[27] Radiation emissions from nuclear power plants, like the 1986 emission from the plant at Chernobyl in the Ukraine, threatened food supplies all over Europe.[28] Destruction of the Amazon forests threatened the planet's oxygen supply.[29] Depletion of the ozone layer through the emission of chlorofluorocarbons threatened to admit more of the sun's cancer-causing rays.[30] Lester Brown summarized "the new sources of danger" as arising from "oil depletion, soil erosion, land degradation, shrinking forests, deteriorating grasslands, and climate alteration."[31] Many species of animals were endangered by environmental spoliation, and their survival was addressed by an increasing number of treaties.

Social and economic problems came increasingly to be perceived as global in character. Trafficking in drugs was addressed in an international context. The inability of many Third World states to repay debts to banks in developed states was perceived as an international issue, not simply as a matter of private collection of a debt. The economic gap between North and South came, at the insistence of the South, to be viewed as an international problem. International disasters, like famines in Africa and earthquakes in Mexico and Armenia, were viewed as requiring immediate action by other states. Private relief campaigns were undertaken on an unprecedented scale.

Technological developments also brought increased danger from the possibility of physical harm inflicted by individuals. The threat of harm from acts by individuals or small groups came to be viewed as a serious international problem. Formerly, an individual could threaten only small numbers of other individuals. But in the latter part of the twentieth century, individuals or small groups could commandeer aircraft. Hand-held missiles gave individuals the capability of shooting down aircraft in flight. Nuclear technology was so widespread that even small groups might assemble a

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27. Nanda, *Global Warming and International Environmental Law—A Preliminary Inquiry*, 30 Harv. Int'l L.J. 375 (1989).

28. *See* Malone, *The Chernobyl Accident: A Case Study in International Law Regulating State Responsibility for Transboundary Nuclear Pollution*, 12 Colum. J. Envtl. L. 203, 206 (1987).

29. Murphy, *Implements for the World Garden*, 54 Ekistics 336, 340-41 (1987) (address delivered July 1985).

30. S. Kim, The Quest for a Just World Order 253-54 (1984).

31. Brown, *Redefining National Security*, in The Global Agenda: Issues and Perspectives 371, 372 (1988).

nuclear weapon.

Increasingly sophisticated communications systems also brought the danger of harm at the international level. Injecting a virus into a computer system could disrupt communications systems worldwide. An individual "computer hacker" might interfere with military communications or medical care delivery.

Wars continued to take their toll with many so-called "regional conflicts" in many areas. The Palestine-Israel conflict persisted as other regional conflicts were resolved. The threat of nuclear war remained, and concern became even greater following investigations showing that a major nuclear attack would affect not only the target area but substantial portions of the planet, whose capacity to support life would be eroded in what was called a "nuclear winter."[32]

Contributing to the perception of possible harms was the role played by the mass media. Events like the nuclear radiation leak in the Ukraine or the Palestine-Israel conflict were instantly brought to the awareness of the public around the world. Public concern put pressure on government officials to deal with issues and conflicts that in earlier times might have gone unnoticed. It also led to action by citizen groups.

## III. New Geographic Areas for Collaboration

A factor that opened the door to a new form of international collaboration was the potential exploitation of resources found in three previously inaccessible environments—Antarctica, outer space and the deep seabed. Third World states urged that these resources should be exploited by international institutions to benefit the international community as a whole, as the "common heritage of mankind," with a preferential share to the poorest states.

With respect to the deep seabed, an international scheme was negotiated and in 1980, the United States backed away from what it called worldwide socialism and rejected internationalized administration of deep-sea resources. Space became a limited resource with the development of communication satellites, which became a primary tool for international communication. Only a limited number of good orbit trajectories (called geostationary orbits) could be used to transmit to earth. Developing states, as with the seabed, argued that orbiting locations constituted a "common heritage,"

32. Sagan, *Nuclear War and Climatic Catastrophe: A Nuclear Winter*, in The Global Agenda: Issues and Perspectives, *supra* note 31, at 409-424.

while developed states preferred allocation to those first able to use them. Some compromise was achieved.[33] In Antarctica, an agreement was negotiated to limit states in their exploitation of mineral resources.[34]

## IV. South-North Tension Over Resource Control

Control of resources has long been a matter of international concern and tension. In the nineteenth century, as the industrial revolution required inputs from abroad and a market in which to sell mass-produced goods, European states competed with each other for control of foreign territory. In the late twentieth century the issue of control over resources took on a new dimension. The specter of a growing population and substantial starvation in developing states heightened the concern of those states that resources in common areas be considered "common heritage," and that developed states give them an opportunity to catch up with them.

The less developed states declined economically in comparison with the developed states. The terms of trade for their commodities steadily deteriorated through the latter twentieth century.[35] Tariffs continued to be higher on raw materials, their chief exports, than on manufactured goods.[36] The developing states put forward a program that would require fair treatment for them on tariffs in developed states and would impose on developed states an obligation to assist them in the development process. In response, a number of developed states adopted a "generalized system of preferences" to give developing states lower tariffs than they gave to developed states for like commodities.[37]

The international debt crisis of the 1980s produced tension between developed and developing states, but the approach taken to it reflected a change in the international order. Full repayment would have brought such economic devastation to a number of

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33. *See* Kosmo, *The Commercialization of Space: A Regulatory Scheme that Promotes Commercial Ventures and International Responsibility*, 61 S. Cal. L. Rev. 1055 (1988).

34. Convention on the Regulation of Antarctic Mineral Resource Activities, *opened for signature* Nov. 25, 1988, 27 I.L.M. 859 (1988); *see* Jacobsen, *Recent Developments, International Agreements: Convention on the Regulation of Antarctic Mineral Resource Activities, opened for signature Nov.* 25, 1988, 30 Harv. Int'l L.J. 237 (1989); Joyner, *The Evolving Antarctic Minerals Regime*, 19 Ocean Dev. & Int'l L. 73 (1988).

35. S. Kim, *supra* note 30, at 154-55; Head, *South-North Dangers*, 68 Foreign Aff. 71, 80 (1989).

36. S. Kim, *supra* note 30, at 155.

37. *See, e.g.*, Trade Act of 1974, 19 U.S.C. §§ 2461-2466.

states that their governments declared that they could not pay in full. The developed states had to consider the consequences of insisting on repayment under the contractual terms to the continuing relations between developing states and the developed world. It therefore compromised with proposals for partial debt reduction.[38] In the early twentieth century, a declaration of inability to pay by a Third World state might have led to the appearance of gunboats in the major port of such a state, but by the late twentieth century the economic inter-relations between the Third World states and the developed states made it necessary to find a solution that would continue the relationship.

Tension developed between Brazil and other states over the Amazon forests, as it was realized that the cutting of those forests threatened the world's oxygen supply. Brazil argued that as a developing state it should be able to use its own resources to its best advantage, and that it need not give primary consideration to the effects on others. The alliances that developed on this issue reflected the new style of international process. Many other states were allied with non-governmental environmental organizations, and with those Brazilians who made a livelihood by tapping the Amazon trees to make rubber. All were arrayed against the Brazilian government and Brazilian developers.

The U.S.S.R. for the most part supported the newly independent states in their quest for what they viewed as a more just international economic and political order. It shared with them a concern that international law as it stood at mid-century was Western European-derived. Like them, it was wary of international custom as a source of law since that custom had been developed by Western Europe, and judges in international tribunals looked to Western European practice to determine customary norms. Like them, it promoted multilateral treaties as a more appropriate vehicle for establishing international-legal norms.

Wariness about the Western European orientation of international law also made both the Third World and the U.S.S.R. reluctant to accept compulsory international adjudication. Both the substantive law and the personnel of international tribunals were viewed as Western-oriented. By the 1980s, however, this view had changed. The Third World came to command about half the seats on the International Court of Justice. Much of the law was by then to be found in multilateral treaties, in which the U.S.S.R. and the

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38. Sachs, *Making the Brady Plan Work*, 68 Foreign Aff. 87 (1989).

Third World had played a role. By the last decade of the century, the initiative in the expansion of international law had been taken over by the Third World and the U.S.S.R. and its allied states.

## V. The Expanded Operation of International Law

As a common quest for survival assumed a more central role, the character of international law changed. International law came to regulate relations formerly left to domestic jurisdiction.[39] International procedures increasingly invaded domestic legal processes. International law developed to create many new sets of norms, including those relating to human rights, self-determination of peoples, liability of a state for assisting another state to violate international law, liability of a state for high-risk domestic economic activity, mandatory rules from which states were not permitted to derogate, criminal liability on the part of individual persons, and criminal liability on the part of states. Taken together, these expansions gave international law a much more serious role in ordering legal relations.

### A. *Human Rights*

The development in the twentieth century of human rights law seriously invaded domestic jurisdiction. Nineteenth century international law had known humanitarian law, which protected individuals in wartime. It also knew "denial of justice," which protected an individual from ill treatment by a foreign government. But the wrong was deemed a wrong against the state of which the victim was a national, not a wrong directly against the victim. And the international law on denial of justice did not protect an individual from her or his own government.

Human rights law began with political rights but, largely at the urging of the Soviet Union, expanded to include social and economic rights, like employment, education, and health care.[40] In the latter half of the twentieth century, at the insistence of Third World states,[41] it expanded to such matters of common concern as

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39. Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations*, in THE EXPANSION OF INTERNATIONAL SOCIETY 357, 368 (1984); Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS 1 (1967).

40. *See* Konst. SSSR, arts. 118-123 (U.S.S.R. Constitution 1936); A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 300-03 (1986).

41. A. CASSESE, *supra* note 40, at 307.

a right to a clean environment,[42] a right to food,[43] a right to development,[44] and a right to peace (freedom from war).[45] These matters were formulated as rights of the individual, or as collective rights of a group. There developed, for example, the notion that a people, as a collectivity, has a right to development, and that this included a duty for governments to promote the development of their citizens,[46] and for developed states to pursue aid and trade policies that promote development in the Third World.[47]

Regional and universal mechanisms to enforce human rights grew. Africa in the 1980s generated a treaty for a regional human rights mechanism,[48] and the Western Hemisphere, which already had one, upgraded it by establishing a human rights court.[49] In Arab states, proposals for a regional human rights treaty were aired.[50] A regional human rights treaty was advocated for Eastern Europe.[51] The U.S.S.R. dropped its long-standing objection to international monitoring of human rights on its territory.[52] In 1989 it withdrew reservations it had filed to six human rights treaties by which it had opted out of the compulsory jurisdiction of the International Court of Justice for disputes over interpretation.[53]

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42. *Report of the United Nations Conference on the Human Environment (Stockholm Declaration) June 5-16, 1972*, at 4, U.N. Doc. A/CONF.48/14/Rev. 1 (1973); Timoshenko, *supra* note 25, at 86.

43. *Universal Declaration of Human Rights*, art. 25, G.A. Res. 217, Dec. 10, 1948, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948); Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 442 (1981); THE RIGHT TO FOOD (P. Alston & K. Tomasevski eds. 1985).

44. Marks, *supra* note 43, at 444-45.

45. *Declaration on the Preparation of Societies for Life in Peace*, G.A. Res. 33/73, 33 U.N. GAOR Supp. (No. 45) at 55, U.N. Doc. A/33/45 (1979)("Every . . . human being . . . has the inherent right to life in peace.") Vote: 138-0-2; Marks, *supra* note 43, at 445-46.

46. *Charter of Economic Rights and Duties of States*, chap. 2, art. 7, G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1975), *reprinted in* 14 I.L.M. 251 (1975); J. DILLOWAY, *supra* note 21, at 19.

47. Marks, *supra* note 43, at 444.

48. *African Charter on Human and Peoples' Rights, June 27, 1981, entered into force* Oct. 21, 1986, 21 I.L.M. 58 (1982); 7 HUM. RTS. L.J. 403 (1986).

49. *American Convention on Human Rights, Nov. 22, 1969, entered into force* June 1978, Organization of American States, *Official Records* OEA/SER.K/XVI/1.1, Document 65, Rev. 1, Corr. 1, Jan. 7, 1970, *reprinted in* 9 I.L.M. 673 (1970).

50. Youssoufi, *Human Rights in Arab Countries*, INT'L COMM'N JURISTS REV. 33 (Dec. 1987).

51. Chkhikvadze, *O Nekotorykh Mezhdunarodnykh Aspektakh Problemy Prav Cheloveka* [On Certain International Aspects of the Issue of Human Rights] 1988(7) SOV. GOS. & PRAVO [Soviet State and Law] 85, 92.

52. A. CASSESE, *supra* note 40, at 303; Quigley, *Human Rights Study in Soviet Academia*, 11 HUM. RTS. Q. 452, 457 (1989).

53. *Soviet Union Accepts Compulsory Jurisdiction of ICJ for Six Human Rights Con-*

The first and best developed regional system was that of Western Europe, which came to provide, in effect, a supranational appeals court for persons alleging violation of their rights in domestic courts. This system had a strong impact on states. The European Convention was accepted as domestic law in a number of states parties, and it had a strong impact on civil rights in the domestic courts of state parties.[54] States parties typically complied with adverse decisions, as when the United Kingdom's decision repealed the Northern Ireland sodomy statute after the European Court of Human Rights found it to violate the European Convention's right of privacy.[55] In the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, the European states agreed to a highly invasive procedure whereby an international panel had the right to visit prisons located in their territory to verify allegations of physical abuse of detainees.[56]

The law regulating the conduct of warfare and post-war military occupation also underwent significant change. It evolved from a law between states to a law in which individuals directly bore rights. The nineteenth century law on this topic, called humanitarian law, was based on treaty or customary-law duties between and among the belligerent powers. They agreed among themselves to refrain from torturing prisoners and to treat civilians humanely in territory they occupied. But in the late twentieth century, human rights law invaded this domain. Increasingly, states viewed those caught up in war as bearing rights under human rights law. Thus, if a belligerent power in occupation of foreign territory violated the rights of individuals, it might be accused of violating human rights norms.[57]

Human rights law challenged the traditional structure of in-

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*ventions*, 83 AM. J. INT'L L. 457 (1989) (Letter of Soviet Minister for Foreign Affairs to U.N. Secretary-General, Feb. 28, 1989).

54. Danish Center of Human Rights, *The Implementation in National Law of the European Convention on Human Rights: Proceedings of the Fourth Copenhagen Conference on Human Rights*, 28 and 29 October 1988 (1989).

55. Dudgeon Case, 45 Eur. Ct. H.R. (ser. A) (1981).

56. European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, *opened for signature* Nov. 26, 1987, Council of Europe Doc. H (87) 4, *reprinted in* 27 I.L.M. 1152 (1988); *See* Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128, 139-45 (1989).

57. *See* Quigley, *The Relation Between Human Rights Law and the Law of Belligerent Occupation: Does an Occupied Population Have a Right to Freedom of Assembly and Expression?*, 12 BOSTON C. INT'L & COMP. L. REV. 1 (1989).

ternational law in three ways. First, it gave rights to individuals. It posited that the individual, regardless of any affiliation with a state, has rights that may not be violated by any state. Second, human rights law invaded domestic jurisdiction in a serious way. It opened a vast area of state conduct to international scrutiny. This aspect of human rights law led to opposition to it. In the United States, in particular, the Senate opposed adhering to human rights treaties, out of concern that such issues as race relations would become the subject of international investigation. Whether a state gives equal treatment to all its citizens, whether it incarcerates arbitrarily, whether it gives a right to counsel in criminal cases—all these became matters of international concern. In 1989 the European Court of Human Rights found the conditions under which prisoners condemned to death are held to be subject to international scrutiny. It said that if the United Kingdom were to extradite to Virginia a person accused of a capital offense, the person would be subjected to "inhuman or degrading treatment or punishment" under Article 3 of the European Convention, since it found those conditions deficient.[58]

Third, human rights law involved obligations from one state to another. A state obligation not to violate the rights of the individual was considered to run not only to the individual but to other states. Thus, if a state violated the rights of a given individual it thereby violated an obligation to all other states. This concept was expressed by the International Court of Justice when it said that human rights norms are norms *erga omnes*, meaning that each state is obliged before every other state to observe human rights.[59]

As formulated in 1949, this same *erga omnes* concept adhered in humanitarian law. The four 1949 Geneva conventions regulating the conduct of belligerent states all included an identical Article 1 that required states not only to observe the convention but to ensure respect for it by the other signatory states.[60] Thus, states un-

58. Soering Case, 161 Eur. Ct. H.R. 8 (ser. A) (1989); Quigley & Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 VA. J. INT'L L. — (1990).

59. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 32; Brownlie, *To What Extent Are the Traditional Categories of Lex Lata and Lex Ferenda Still Viable?*, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 66, 71 (1988) [hereinafter CHANGE AND STABILITY].

60. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Treat-

dertook an obligation to encourage other states to observe the conventions. This idea went beyond the traditional view that only in the event of breach were another signatory state's rights affected. The common Article 1 imposed on signatory states, even prior to a breach by another, an obligation to encourage compliance. Thus, each signatory state was responsible for any individual anywhere who might need the convention's protection. This idea was reflective of a world community approach, as opposed to a notion of a treaty as simply a contract between two states.

### *B. Self-Determination of Peoples*

The right to self-determination developed at the same period as human rights law.[61] It too took international law beyond the realm of interstate relationships. It posited that certain groupings of individuals, based on their culture and history, have international standing, and a right to determine their own political status. The law of self-determination also included the requirement that a state administering the territory of another people must do so in the interests of that people, not for its own gain.[62] Self-determination was viewed as a prerequisite for peace, since peoples forcibly deprived of freedom could be expected to fight to attain it. In this way it took a more sophisticated approach to preserving the peace, since it looked not to the outbreak of hostilities but to an underlying cause of hostilities.

Support for self-determination was strengthened by the entrance of former colonies onto the international stage as new states. Their own history of being denied self-determination oriented them to championing self-determination in international law.[63] International institutions took up self-determination situa-

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ment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

61. Quigley, *Palestine's Declaration of Independence and the Right of the Palestinians to Statehood*, 7 Boston U. Int'l L.J. 1, 2-12 (1989).

62. Quigley, *The Legality of Military Bases in Non-Self-Governing Territory: The Case of United States Bases in Puerto Rico*, 16 Denver J. Int'l L. & Pol'y 323, 324-26 (1988).

63. One exception relates to self-determination of peoples within the borders of those newly independent states. The fact that colonial boundaries had been drawn in disregard of the territories occupied by national groupings meant that the boundaries, particularly of Africa, were arbitrary. The African states feared that if those boundaries were questioned, anarchy would prevail on the continent. The new states also, of course, had a self-interest in maintaining control over the territory they inherited from the colonial powers.

tions, like those involving the people of Namibia, Western Sahara, Palestine, or Puerto Rico. States began to pressure those states that denied self-determination, as in the Security Council-sponsored commercial boycott of Southern Rhodesia following the establishment there of a racial minority government,[64] and its arms embargo against South Africa.[65] Individual states began to pressure states that violated the right of self-determination by refusing or limiting commercial relations.[66]

The law of self-determination acquired renewed significance in the 1980s when many ethnic groups within constituted states pressed longstanding claims to independence or greater autonomy. The Kurds in various Middle Eastern states, the Sikhs in India, Native Americans in the United States, Hungarians in Romania, Turks in Bulgaria, Croats in Yugoslavia, and the republic populations of the U.S.S.R. all claimed group rights. This pressure kept self-determination a significant issue even as colonialism of the nineteenth century variety gradually ended.

### C. *A Prohibition Against Facilitating Wrongs by Other States*

Another new norm that expanded the reach of international law was complicity. In the latter half of the twentieth century a norm emerged to prohibit material aid to another state that uses the aid to violate internationally protected rights.[67] It developed in response to changes in the international order. The superpower states had acquired the potential to involve other states in their own violations of international law. They used the territory of other states to station their troops, giving rise to the question of the responsibility of the host state if the guest troops committed aggression against some third state. In addition, the superpower states possessed the resources to provide other states with the means to accomplish tasks that they themselves either could not or did not want to undertake directly. Finally, by giving material aid to other states, they made it possible for those states to undertake operations it might not otherwise have been able to undertake, and

64. S.C. Res. 232, 21 U.N. SCOR, *Res. & Decs.* 7, U.N. Doc. S/INF/21/Rev.1 (1968).
65. S.C. Res. 418, 32 U.N. SCOR, *Res. & Decs.* 5, U.N. Doc. S/INF/33 (1978).
66. Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1986).
67. Draft Articles on State Responsibility, art. 27 in *Report of the International Law Commission to the General Assembly*, 33 U.N. GAOR Supp. (No. 10) at 187-96, U.N. Doc. A/33/10 (1978), *reprinted in* [1978] 2 Y.B. INT'L L. COMM'N 78-80, U.N.Doc. A/CN.4/SER.A/1978/Add.1 (pt. 2); Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 1986 BRIT. Y.B. INT'L L. 77, 95-104.

those operations might involve violations of internationally protected rights. A superpower state might, for example, give weaponry or ammunition that the recipient state would use in committing aggression. Some states cut off aid to states that committed serious human rights violations rights. They stopped sales of chemicals upon discovering that they were being used to manufacture chemical weapons.[68]

The recognition of the illegality of providing aid that would be used unlawfully represented a substantial refinement of the law of state responsibility. It mirrored a similar development in the domestic criminal law of homicide, where historically the first act prohibited was infliction of death. At that stage of society, criminal law aimed at reconciling two parties and preventing private vengeance. Only later, when criminal law undertook to protect the entire community did there arise a criminal prohibition against ancillary forms of conduct, like complicity, attempt, or conspiracy.[69] These forms of liability reflected a concept of a community with interests to protect, the offender having manifested a dangerousness that might result in future criminal acts.

Similarly, the emergence in international law of a norm that prohibited states from materially aiding a wrongful act by another state reflected a concept of community interests. A state providing aid was responsible for harm that might be caused by another state, even though it, as the donor, had not been directly involved in bringing about that harm.

A prohibition against helping other states to violate international-legal norms was not confined to material aid. In *Soering*, the United Kingdom extradition case cited above, the European Court of Human Rights imposed on the United Kingdom an obligation not to extradite a person to Virginia. It said that Virginia would violate the person's rights. Yet it said that the United Kingdom would violate the European Convention by, in effect, giving Virginia the opportunity to violate the person's rights. The United Kingdom would itself violate international law by facilitating a violation by Virginia.[70]

### D. *Responsibility for High Risk Activity*

State responsibility also expanded in response to ecological

68. Quigley, *supra* note 67, at 83-95.
69. T. Plucknett, A Concise History of the Common Law 452-54 (5th ed. 1956).
70. *See* Soering Case, 161 Eur. Ct. H.R. 35 (ser. A) (1989).

dangers. As pollution became a more serious problem, states were held responsible to prevent the emission from their territory of pollutants that harm the environments of other states.[71] The International Law Commission undertook to draft a treaty on harm from what it called "acts not prohibited by international law," which included liability for transboundary pollution and other harms resulting from high risk activity.[72] A number of multilateral treaties provided liability for harms from such activity as maritime pollution, the falling of space satellites, and the operation of nuclear power plants.[73] An older rule that, in their use of international rivers, states are not responsible to lower riparian states for diversion or pollution gave way to a rule of fair use, much like that found in domestic law.[74] A convention was also negotiated to curtail the depletion of the ozone layer.[75]

This new liability significantly expanded the scope of the responsibility of one state to another. It meant that liability existed not only for an act specifically directed to another state but for whatever activity might occur within a state—undertaken by the government or by private parties—that caused harm within another state. All industrial activity was thus opened to international scrutiny. Even private persons and corporations could subject their states to international liability from their high risk industrial activity.

### *E. Jus Cogens Norms*

The law of state responsibility also developed the idea of *jus*

71. Jenks, *Liability for Ultra-Hazardous Activities in International Law*, 117 RECUEIL DES COURS 99 (1967); Schneider, *State Responsibility for Environmental Protection and Preservation*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 602, 603 (1985); Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1941).

72. Quentin-Baxter, Special Rapporteur, *Preliminary Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, [1980] 2 Y.B. INT'L L. COMM'N 247 (part 1), U.N. Doc. A/CN.4/334 and Add. 1 and 2 (1980).

73. *See* Quentin-Baxter, *supra* note 72, at 255 n.47 (treaties listed).

74. *Id.* at 257.

75. Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, U.N. Doc. UNEP/IG.53/5/Rev.1, *reprinted in* 26 I.L.M. 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16. 1987, *reprinted in* 26 I.L.M. 1550 (1987); Lammers, *Efforts to Develop a Protocol on Chlorofluorocarbons to the Vienna Convention for the Protection of the Ozone Layer*, 1 HAGUE Y.B. INT'L L. 225 (1988); Whitney, *Talks on Ozone End in Britain Without Fixing Chemical Ban*, N.Y. Times, Mar. 8. 1989, at A8, col. 1; Sorensen, *International Agreements—Montreal Protocol on Substances that Deplete the Ozone Layer*, 29 HARV. INT'L L.J. 185 (1988).

*cogens*, or mandatory norms. The nineteenth century notion was that because international law is between and among states, the states may alter its norms at will. But the *jus cogens* idea was that there are certain norms of such transcending importance that states may not avoid them unilaterally or by agreement with another state.[76] *Jus cogens* challenged the positivist view that states have the final word in establishing international law norms.[77]

*Jus cogens* reflected a concept of an international community. Like a domestic legal order, the international legal order has certain fundamental principles that may not be violated. With *jus cogens*, international law norms came to protect community interests. They reflected the existence of an international *ordre public*.[78]

### F. *Individual Criminal Responsibility*

The individual has for several centuries borne criminal responsibility in international law. The first such crime was piracy, on the theory that the offense was against all humankind. A pirate was called *hostis humanis generis*. The crime of piracy implied a certain concept of a world community, since piracy was deemed to violate the world social order. Later, slave trading became a crime of individual responsibility, on the same theory.

Individual criminal responsibility became more significant in the mid-twentieth century with the war crimes trials held after World War II, particularly at Nuremberg and Tokyo. Here too the concept was that the crimes affected the world social order. One formulation of crime was for widespread killing, which was denominated "crime against humanity." The concept of war crimes was used extensively in the four 1949 Geneva humanitarian conventions.[79] Individual criminal responsibility reflected a concept of a

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76. Vienna Convention on the Law of Treaties, arts. 53, 64. *entered into force* Jan. 27, 1980, U.N. Doc. A/CONF.39/27 (1969), *reprinted in* 8 I.L.M. 679 (1969); Brownlie, *To What Extent Are the Traditional Categories of Lex Lata and Lex Ferenda Still Viable?*, in CHANGE AND STABILITY, *supra* note 59, at 66, 71.

77. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 361 (1988).

78. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 949 (1967).

79. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 60, arts. 49-50; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *supra* note 60, arts. 50-51; Convention Relative to the Treatment of Prisoners of War, *supra* note 60, arts. 129-130; Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 60, arts. 146-147.

world community as well by making the individual directly responsible before the international community. The individual's responsibility ran not only to states whose laws she or he might violate, but also to an international body politic.

### *G. State Criminal Responsibility*

The existence of a world community was also assumed by an idea that emerged in the latter half of the twentieth century that a state may be guilty of a crime. Certain breaches of international law were deemed more serious than others and merited being considered offenses not simply against the party harmed, but against the world community. The concept of state crime opened the path to international action to curb the illegal acts of states. Its first major manifestation was in Chapter 7 of the United Nations Charter, which provided for collective action in the event of aggression by a state.

The state crime idea was expanded beyond aggression by the International Law Commission in its draft articles on state responsibility.[80] As elaborated by the Commission, major violations of human rights, forcible maintenance of colonialism or other forcible denial of the right to self-determination, and massive pollution of the environment are unlawful state actions against which the international community has a right to respond.[81] The International Law Commission's rationale was that these acts harm not only the individual victims but the world order as a whole.[82]

Historically, the emergence of a distinction between acts affecting other rights-bearers only and acts affecting the international community as a whole paralleled the development in domestic law from regulation of disputes between clans to protection by the body politic of each individual—the development from tort to crime.[83] Harm to the individual was first handled by a law giving

80. Draft Articles on State Responsibility, art. 19, in *Report of the International Law Commission to the General Assembly*, 35 U.N. GAOR Supp. (No. 10) at 59, 64. U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 30, U.N. Doc. A/CN.4/SER.A/1980/Add. 1 (part 2).

81. *Id.*

82. Quigley, *The International Law Commission's Crime-Delict Distinction: A Toothless Tiger?*, 66 REVUE DE DROIT INT'L 117, 119 (1988). For opposition to the concept of international crime on the ground that there is not a genuine international community, *see* Wise, *International Crimes and Domestic International Law*, 38 DEPAUL L. REV. 923, 931 (1989).

83. Gounelle, *Quelques Remarques sur la Notion de Crime International et sur l'Evolution de la Responsabilité Internationale de l'Etat*, in MÉLANGES OFFERTS À PAUL REUTER, LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 315, 318 (1981).

the victim's clan redress against the perpetrator's clan and later developed into a law that posited that one who caused harm to an individual had violated an obligation of fealty to the sovereign. This development resulted in England in the emergence of the concept of felony, which meant a breach of the obligation of an individual to the sovereign.[84]

As in domestic law, the development from tort to crime reflected a reform in the political order. In domestic law, the change from law as a regulator of inter-clan conflict to law as a regulator of relations between a sovereign and an individual paralleled the strengthening of the power of the state. The sovereign had claims against each individual. In international law, the introduction of state crime reflected a change from law as a regulator of interstate conflict to law as a regulator of relations in an international community.

## VI. A New International Legal Style

Apart from the development of new norms, international law experienced a marked change in the process by which norms were created. Norm-creation became faster and simpler. As states dealt with each other on an ever widening range of issues, norms came to be established by multilateral treaty on many matters. The process of formation of norms of customary law was radically altered by the increasing interaction of states. Formerly, a period of time was necessary for the formation of a customary norm. But as states interacted more frequently, norms formed rapidly.[85] Joint statements at international conferences came to be regarded as evidence of state practice.[86] Provisions of multilateral treaties came to be seen as reflecting customary law.[87]

A new notion developed in international norm-creation that went under the name "soft law." Certain nascent norms were seen as being in a kind of gestation period, having some support in state

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84. T. Plucknett, *supra* note 69, at 442.

85. A. D'Amato, The Concept of Custom in International Law 56-60 (1971); Cassese, *General Round-Up*, in Change and Stability, *supra* note 59, at 166; North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 42.

86. Fisheries Jurisdiction Case (U.K. v. Ice.), 1974 I.C.J. 25.

87. Restatement (Third) of Foreign Relations Law of the United States § 102 (1987); Sohn, *The Law of the Sea: Customary International Law Developments*, 34 Am. U.L. Rev. 271-78 (1985); Sohn, *"Generally Accepted" International Rules*, 61 Wash. L. Rev. 1073, 1076 (1986); North Sea Continental Shelf Cases (W. Ger. v. Den. & Neth.), 1969 I.C.J. 3, 41; A. D'Amato, *supra* note 85, at 164-66; D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110, 1146 (1982).

practice but not yet accepted as law.[88] The concept of "soft law" gave some standing to concepts not fully accepted as norms. The designation speeded acceptance of the concept as a full norm.

## VII. The New Law and State Sovereignty

While the general tendency of the new norm-creation was to subject more areas of conduct within a state to international regulation, there was a reverse tendency as well.[89] The Third World states pressed for non-interference in their affairs by the stronger states, thereby emphasizing their sovereignty. The Western hemisphere states wrote into the O.A.S. Charter a strong provision against military intervention.[90] They were wary not only of troop intervention, but of economic intervention that might bring outside domination of their labor and material resources.[91] Third World states pressed for recognition of claims to broad stretches of coastal water as being under national jurisdiction, to protect them from use by the developed states, particularly for fishing. The outlawing of cross-border pollution also involved a strengthening of the sovereignty of the victim states. Thus, while the newly emerging law infringed the sovereignty of states, it often did so by strengthening the sovereignty of the states who were potential victims of the conduct in question.

The most significant tendency, still, was in the direction of eroding state sovereignty. The erosion came about in response to conditions that required states to act collectively, and this same necessity is likely to lead to a further substantial erosion of sovereignty. "[S]tates will be forced to agree voluntarily to a limitation on sovereignty that would allow for solutions to many problems of domestic development," said a leading Soviet international lawyer.[92]

This encroachment on sovereignty elicited some objection. Certain developed states, seeing the dynamism in norm creation being taken over by the developing states, argued in the 1980s that customary law was forming too easily. The United States, for example, argued, not without basis, that a customary norm could not

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88. CHANGE AND STABILITY, *supra* note 59, at 89-90 (statement of Georges Abi-Saab).

89. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 20 (1984).

90. Charter of the Organization of American States, *opened for signature* Apr. 30, 1948, arts. 15-18, 2 U.S.T. 2394, 2419-20, T.I.A.S. No. 2361, 119 U.N.T.S. 3, 57-8 (1948).

91. S. KIM, *supra* note 30, at 53-54.

92. Blishchenko, *supra* note 20, at 111.

bind a state that "persistently objected" to its formation.[93] This represented a turnabout from an earlier period when it was the developing states and the U.S.S.R. that insisted on the consent of states as a basis for norm creation[94] because they did not view themselves as having a role in creating customary norms.

There was also concern that international law was restricting too significantly the unilateral action a state might find appropriate to meet a perceived threat. The United States during the 1980s, in justifying various military actions, advanced arguments that sought to expand the bases for justification of the use of force.[95]

While the encroachment on sovereignty was substantial, it represented merely an acceleration of a process of long standing, not a new process. Sovereignty had always been ceded when states perceived a need for international action. After World War I the right of states to go to war gave way to a prohibition against aggressive force. Sovereignty was infringed in the aim of preventing another major war. Even as "domestic" an issue as employer-employee relations gave way in the early twentieth century to a limited degree of international regulation. The Bolshevik Revolution in Russia in 1917 presented the possibility of the overthrow of governments by groups espousing worker rights. The major powers viewed worker rebellion as a threat to themselves.[96] So in 1919 they established the International Labor Organization and in its constitution identified discontent among workers as a threat to world peace:

> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled.[97]

The preamble drew the conclusion that "improvement of those conditions is urgently required" and listed as areas of reform: hours of work, prevention of unemployment, wage levels, work-related disease and injury, protection of children, and freedom of

93. *See* Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 4 (1985).

94. Quigley, *supra* note 4, at 15.

95. Quigley, *The Reagan Administration's Legacy to International Law*, 2 TEMP. INT'L & COMP. L.J. 199, 200-04 (1988).

96. A. ALCOCK, HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION 10 (1971).

97. Constitution of the International Labor Organization, Oct. 9. 1946, Preamble, 15 U.N.T.S. 35 (amended text, but no change in this language from 1919 version).

worker association.[98]

Sovereignty was eroded in another way as well in the latter half of the twentieth century. International law came increasingly to be applied domestically. Historically, the division between domestic law and international law was sharp. International law, as a law between states was handled in foreign offices and through international negotiation. It had only limited impact on the law applied in domestic courts. Increasingly, however, international law impacted on the law applied in domestic courts.

This phenomenon was most dramatic in Europe, where domestic law was displaced by European Community law through public administration at the community level, and through a community court with power to enforce community law against conflicting domestic law.[99] As indicated above, Europe's human rights procedures also impacted significantly on domestic courts in Europe.[100]

Elsewhere, the rate of increase of international law was less dramatic. But the steady growth of international interaction brought an increasing number of internationally-related disputes into domestic courts. As states became more involved in commercial activity in the twentieth century, courts abandoned their former notion that states enjoy absolute immunity from court jurisdiction in other states and adjudicated claims against them.[101] Domestic courts began to apply human rights law.[102] With the increase in international air travel, domestic courts routinely applied the international rules on the liability of air carriers embodied in the Warsaw Convention.[103]

## VIII. The Role of Non-State Actors in International Law

While international law in the nineteenth century was a law for states, this concept was substantially eroded in the latter half of the twentieth century. Individual persons, groups, and corporations began to play an international role and started to become the

98. *Id.*

99. D. Wyatt & A. Dashwood, The Substantive Law of the EEC 53-55 (1980).

100. *See supra* notes 54-56 and accompanying text.

101. *See, e.g.*, Dralle v. Republic of Czechoslovakia, 1950 I.L.R. 155 (Austria Supreme Court 1950).

102. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd. on other grounds*, 754 F.2d 1382 (10th Cir. 1981).

103. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 49 U.S.C.A. App. § 1502 (1976). *See, e.g.*, Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989).

bearers of rights and obligations under international law.

### *A. Citizen Groups*

Individuals and groups began to lobby states on their positions on international law issues. The negotiations leading to the 1982 Law of the Sea Treaty, for example, involved considerable lobbying by citizen groups seeking equitable distribution of deep seabed resources and strong environmental protection. The United Nations has encouraged these efforts by giving citizen groups access to the United Nations. It thus allows these groups, which it designates non-governmental organizations, to make their views known to relevant United Nations bodies.

This development was facilitated by the increasing ease of international communication and transportation, which allowed like-minded individuals worldwide to be in touch with each other.[104] Persons with common interests united on issues of common concern.[105] Workers supported the demands of workers in other states for improved wages or work conditions, and writers supported the demands of writers in other states for greater freedom of expression.[106]

Citizen groups, often worldwide in membership, came to constitute an influential constituency in the international legal arena.[107] Many citizen groups had a serious impact on the policies of governments. In West Germany, citizen groups opposed to nuclear weaponry were instrumental in the West German government's decision to urge other NATO states to reduce the levels of their weaponry. Non-governmental human rights monitoring organizations generated considerable pressure on states by publicizing rights violations. The Greenpeace organization blocked ships fishing for endangered species and disrupted nuclear weapons testing.

With the emergence of human rights law and individual criminal responsibility, individuals increasingly viewed themselves as direct participants in the international system, apart from their affiliation with a state. They invoked international law in domestic

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104. The level of transactions between persons of different states is said to double every ten years. Inkeles, *The Emerging Social Structure of the World*, 27 World Pol. 467, 479 (1975).

105. *See* A. Cassese, *supra* note 40, at 414-17.

106. Dore, *University and Diversity in World Culture*, in The Expansion of International Society, *supra* note 39, at 407, 418.

107. Galtung, *Self-Reliance: An Overriding Strategy for Transition*, in 1 Toward a Just World Order 602, 616-17 (1982); A. Cassese, *supra* note 40, at 410.

courts. Persons charged with criminal offenses for acts that challenged their governments, appealed to international law as a legal basis for their actions. They asserted a violation of international law by the state as justification for their own action or said that their state's action was unlawful and that as a citizen they would be responsible for an international crime by permitting the action to continue.[108]

The increasing role of individuals and groups added a new element of strength to international law. If there is to be a world community, it must enjoy the support of the subjects of that community. Just as domestic governmental processes remain representative only if the citizenry is interested and vigilant, so international processes can serve the welfare of the world community only if the world community insists that these ends be served. It was said of the League of Nations that one reason it was unable to keep the peace was that there had not developed "a public opinion in the service of peace," and that nationalistic feeling prevailed over a demand that states not go to war.[109] But in the latter half of the twentieth century, substantial support developed for international procedures directed at promoting the survival needs of the world community.

### *B. Business Corporations*

Multinational corporations—another type of non-state actor—also came to exert pressure on governments, lobbying states on international legal issues. The strong negative reaction of the United States to the "common heritage of mankind" principle in the General Assembly's Moon Treaty resulted primarily from pressure of mining corporations concerned that the Treaty's "common heritage" principle regarding the Moon's mineral resources would hamper their projected exploration and mining of the Moon.[110] Pressure from these companies also influenced the United States to back away from the "common heritage of mankind" principle in the Law of the Sea Treaty.[111]

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108. *See* F. BOYLE, DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW 109-10 (1987).

109. C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 55-56 (P. Corbett trans. 1957); *see also* E. CARR, THE TWENTY YEARS CRISIS (1919-1939) at 37-38 (1962).

110. Richardson, *In Pursuit of a Law of the Sea*, Wash. Post, Mar. 24, 1980, at A22, col. 3.

111. *Deep Seabed Mining, Hearings on H.R. 3350 and H.R. 4582: Hearings Before the House Subcomm. on Oceanography*, 95th Cong., 1st Sess. 135, 191, 205, 228, 311, 345 (state-

Corporations to date have had only a marginal role in international organizations. It has been suggested that they should have a role in international law-making.[112] However, with the exception of the International Labor Organization, which provides for direct participation by labor and business, corporations have not been given a significant role in law-making or other activities of international organizations.[113]

Nonetheless, corporations are significant international actors, some commanding resources that dwarf those of many states. Like individuals and citizen groups, they have come to form an important element of the world community.

## IX. The Role of International Institutions

International institutions have also become important actors in international affairs. While international institutions are created by states, they often develop a life of their own and play an independent role. In the late twentieth century, international institutions came to occupy an important position in international life.[114] Many were at the regional level, reflecting a search for solutions to problems in concert with neighboring states.[115] In the 1980s the Gulf Cooperation Council and the Organization of Eastern Caribbean States were added to the existing regional organizations. The EEC gradually replaced the individual European states as economic and political actors. With its 1992 changes, the EEC reflected a high level of economic, political, and legal integration, permitting supranational decisions binding on member states on a broad range of issues.[116] A number of regional economic organizations were established to coordinate economic policy. Regional organizations became a significant factor in the international legal order.

International institutions of universal scope came to manage an increasing range of international work in the latter half of the twentieth century. Many were associated with the United Nations, and much of their activity related to economic development. The

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ments of corporate representatives).

112. Charney, *Transnational Corporations and Developing Public International Law*, 1983 Duke L.J. 748, 754-56.

113. *Id.* at 750-51.

114. W. Friedmann, The Changing Structure of International Law 275 (1964).

115. A. Cassese, *supra* note 40, at 411.

116. Meessen, *Europe en Route to 1991: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 Int'l Law. 359 (1989).

United Nations Food and Agriculture Organization, for example, along with several score of other inter-governmental organizations, worked to improve food supplies.[117]

Cold war differences between the major powers put serious limitations on the role of international institutions. Those differences kept the Security Council from playing the role projected for it in the United Nations Charter. In the 1980s Soviet President Gorbachev called for greater use of international institutions in solving regional conflicts and in resolving the problems of poverty and ecological spoliation.[118] Gorbachev called for greater use by states of the International Court of Justice to resolve disputes, and moved sharply from the U.S.S.R.'s traditional wariness of before-the-fact submission of disputes to compulsory international adjudication.[119]

The Soviet overture to the United Nations and International Court of Justice was significant because of the U.S.S.R.'s traditional caution on ceding powers to international bodies. A Soviet international lawyer saw a need for "voluntary recognition of a certain degree of supranationality for international mechanisms and of the absolute binding character of their decisions."[120] The U.S.S.R. agreed to make long-avoided payments to finance United Nations peacekeeping operations.

The Soviet initiatives at the United Nations opened the possibility that the organization might be able to achieve the goals set out in its Charter in 1945. In the late 1980s, in fact, the United Nations brokered the end to a number of long-standing military conflicts, notably those in Afghanistan, Western Sahara, Namibia and Iran-Iraq.

After World War I, and again after World War II, the initiative for international institutions came from the major powers. Determined to protect the world from the scourge of war, they established international mechanisms. By the 1960s, the initiative came from the newly independent states, who pressed for a world order premised on the view that the resources should be distributed

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117. SENATE SELECT COMM. ON NUTRITION AND HUMAN NEEDS, THE UNITED STATES, FAO AND WORLD FOOD POLITICS' U.S. RELATIONS WITH AN INTERNATIONAL FOOD ORGANIZATION, STAFF REPORT, 94th Cong., 2d Sess. 11-13 (1976); Puchala & Hopkins, *Toward Innovation in the Global Food Regime*, 32 INT'L ORG'N 855 (1978).

118. Aide-mémoire, Sept. 22, 1988, U.N. Doc. A/43/629, Annex (1988).

119. Franck, *Soviet Initiatives: U.S. Responses—New Opportunities for Reviving the United Nations System*, 83 AM. J. INT'L L. 531, 539 (1989).

120. Blishchenko, *supra* note 20, at 111.

more equitably.[121] International institutions increasingly served the ends of economic development.

## X. Law for a World Community

The nineteenth century view that international law was a law for states was eroded by the many changes in the substance of international law and in the process by which it is created, as well as by the appearance of non-state actors and international institutions. These changes tended in the direction of creating a law for what was increasingly viewed as a world community with interests of its own. "The one world in which the law now operates is a world which, despite constant setbacks, is in process of organizing itself as a world community," wrote C. Wilfred Jenks in 1969.[122]

Wolfgang Friedmann in 1964 said that a "co-operative law" was emerging. "Unlike the traditional law of nations," he wrote,

> which is predicated on the assumption of conflicts of national interests, cooperative international law requires a *community* of interests. The challenge posed by the changes in the structure of contemporary international society does not eliminate the pivotal importance of self-interest in international relations; it does, however, radically affect the dimensions and objectives of self-interest. The emerging international organizations are tentative expressions of new world-wide interests in security, survival and co-operation for the preservation and development of vital needs and resources of mankind.[123]

There are several requisites for the formation of a world community. One is that individuals must perceive themselves as citizens not only of their states, but of a world community. They must feel a responsibility for what occurs elsewhere, just as they do for what occurs in their states. "It *would* make a difference to the possibilities of international order if people in Maine should feel the same degree of responsibility toward the people of Japan or Chile or Indo-China as they feel towards California," wrote Ronald Dore.[124] But most individuals still distinguish their own nationals and foreigners as "us" and "them" and place a higher priority on the welfare of the "us."

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121. Johnston, *The International Law and Policy of Human Welfare*, in THE FOUNDATIONS OF JUSTICE IN INTERNATIONAL LAW 111, 118-120 (1978).

122. C. JENKS, A NEW WORLD OF LAW? A STUDY OF THE CREATIVE IMAGINATION IN INTERNATIONAL LAW 219 (1969).

123. W. FRIEDMANN, *supra* note 114, at 367.

124. Dore, *supra* note 106, at 413.

A sense of concern and responsibility may be lacking as well when governments are called upon to act. It is said that the reason that the League of Nations was unable to stop Italy's aggression against Ethiopia was that, while the European states were willing to condemn it verbally, they were unwilling to take action that would have been costly to them to stop a wrong that had occurred in a distant location.[125] De Visscher wrote in 1953 that there was on the part of states only a "very weak perception of common good" that "prevents us from speaking of an international community as something already established."[126] He cautioned against concluding that a "social community" existed at the world level simply "because it would be socially good to have it so."[127] Within states it took a long period of time for individuals to develop a sense of citizenry in the state, as opposed to a loyalty to village, locality, or clan. Indeed, in many places, particularly in Africa and the Middle East, where states are still recent phenomena, that shift in loyalty is far from completed. A world outlook, however, is necessary if global problems are to be addressed effectively.

Whether individuals or states can sufficiently develop a world-view outlook, instead of a state-view outlook, is problematic. "The historical distribution of power has implanted group morals," wrote De Visscher, "and the relations that spring from them rest neither on the perception of an extranational common good nor on the consciousness of a destiny common to all men."[128] But citizen groups, like those pressing for human rights, for peace, and for environmental protection, are urging an "extranational" outlook and have convinced a wide sector of the public in many states to adopt such a view.

There has developed a concept that international law must operate to promote the well-being of the world community. This concept is at odds with the nineteenth century view that international law is whatever states agree to make it,[129] and that moral concerns are secondary.[130] Sometimes viewed as a return to natural law from positivism, the twentieth century approach is that law is not simply what states say it is, but that law must promote the general

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125. C. De Visscher, *supra* note 109, at 58.

126. *Id.* at 72. While the English translation was published in 1957, the French original was published in 1953.

127. *See id.* at 88.

128. *See id.* at 95-96. *See also* Murphy, *supra* note 29, at 337.

129. C. De Visscher, *supra* note 109, at 51-52; S. Kim, *supra* note 30, at 33.

130. Brownlie, *supra* note 39, at 359-60.

welfare.

This approach was reflected in the statements of political figures, regarding military conflict situations; their aim was to achieve peace with justice. During World War I, this idea was associated with President Woodrow Wilson, who saw self-determination of peoples as a prerequisite for a lasting peace. The idea was also taken up by those who saw in the existing international order a preservation of a position of domination by wealthier states and by wealthier individuals within states. The world community, it was argued, should pursue the goal of equitable distribution of resources. After the demise of political colonialism in Africa and Asia, the newly independent states took up this notion, arguing for economic policies at the international level that would allow them to compete with the developed states. The idea was also framed by depicting the existing order as inherently unjust, and able to maintain itself only through a kind of systemic violence.[131]

## XI. Obstacles to the Emergence of a World Community

The kind of world community that could cope with survival issues effectively is only in its nascent stage. There are serious obstacles in the path of its full development. Can a law be developed for a world community when law around the world is quite diverse? Is culture too diverse to support a common law for the world? Are political systems too diverse? Are the economic differences between the wealthy and poor states too significant for there to be the common interests necessary for a world community? Are states too substantial an obstacle?

### A. *Diversity of Law*

Commonality has long been sought as a basis for international law. In the seventeenth century, Grotius tried to determine whether a Europe composed of independent states could support a law that would be applicable among them. He sought a basis for an international law in commonalities in the norms followed in European states.[132] When the government of France, in the wake of the French Revolution, espoused new principles of governance, it was

131. Galtung, *A Structural Theory of Imperialism*, 8 J. Peace Res. 81 (1971); Asbjörn Eide, *International Law, Dominance and the Use of Force*, 11 J. Peace Res. 1 (1974).

132. H. Grotius, The Rights of War and Peace (A. Campbell trans. 1901, originally published 1625); Bozeman, *Does International Law Have a Future?*, 6 N.Y.L. Sch. J. Int'l & Comp. L. 289, 290 (1985).

feared that a basis for an international law applicable throughout Europe had been eliminated. In the twentieth century, the question has been raised as to whether international law might have lost its base of commonality as it expanded beyond European-based societies to include those of Asia, the Middle East and Africa.[133] The issue was also raised by representatives of governments that purported to function on bases different from those of other states. The Soviet government that came to power in Russia in 1917 said that it was of a new type and that the norms found in the society it was creating differed from those found in other states. On that basis, it argued that international law was possible, as between it and other states, on only a limited basis.

If the differences in legal norms accepted by the various states are too great, then achieving common solutions through law may be difficult. While differences are significant, there is on the whole a remarkable degree of cohesion. That cohesion is in some measure a product of the industrial revolution. As Western European traders established worldwide networks for the sale of goods in the seventeenth and eighteenth centuries, they took with them concepts of law necessary for commercial relations. Already in Europe a common body of commercial custom, called law merchant, had developed.

As the European powers established colonies in the Americas and later in south and southeast Asia and in Africa, they enacted law based on their own. In some cases the European system became nearly exclusive of the indigenous system, as in the Americas, whereas in others it coexisted with the indigenous system, as was generally the case in Africa. But even though it did not everywhere become the exclusive law, European law had a considerable impact. In the early twentieth century, even absent colonization, European law was used in Japan and China as a model for legal reform. During the same period, in the Middle East, Great Britain and France established a quasi-colonial control and legislated on their own models.

The unity of European law survived the establishment of the U.S.S.R. and its allied states in the twentieth century. While introducing new features into their legal systems, these states remained within the European legal tradition.[134] The legal style and language of France and Great Britain, the two major nineteenth century col-

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133. A. Cassese, *supra* note 40, at 70-71.

134. Quigley, *Socialist Law and the Civil Law Tradition*, 37 Am. J. Comp. L. 301 (1989).

onizers, came to be that of diplomacy, and continued to be used in the major multilateral treaties.

### *B. Diversity of Culture*

Another difficulty in a transition to a world community law is variance in culture. It has been argued that cultures are too diverse to support a world system of law.[135] Moreover, in the post-colonial period, Third World states have strived to maintain their cultures against Western domination, through such initiatives as the New International Information Order, whose aim was to combat the dominance in the news media of a First World outlook. In the Islamic world, religion was reasserted in a way that separated its followers farther from Western culture.[136] Internationally, a certain commonality of culture exists within elites, largely a Western-derived culture. But outside the West, this culture is not shared beyond the elite groups.[137]

Cultural differences have surfaced during many efforts at international regulation. Polygamy is viewed by some as a violation of the rights of women, while by others it is viewed as a reflection of certain cultures. The circumcision of young girls, practiced in many parts of Africa, is widely viewed as a violation of human rights, but some justify the practice as a reflection of a culture.

On the other hand, there is a certain commonality in seemingly diverse cultures. While nineteenth century Europeans drew a sharp line between the civilized and uncivilized parts of the world, with Europe and its settler colonies in the Americas as the civilized parts, Europe itself had drawn on other cultures to create what it had become by the time of its industrial revolution. Much of its culture stemmed from ancient Egypt and other parts of the Middle East. Until the fifteenth century, Spain was under Arab rule. Mathematics, science, medicine and technology were more advanced there than in northern Europe. Indeed, northern Europe drew on this Arab learning to create its industrial revolution. Islam, the religion predominating in the Arab world, is a seventh century offshoot of Christianity.

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135. A. Bozeman, The Future of Law in a Multicultural World 161-62 (1971); Bozeman, *The International Order in a Multicultural World*, in The Expansion of International Society, *supra* note 39, at 387, 404.

136. Bozeman, *The International Order in a Multicultural World*, in The Expansion of International Society, *supra* note 39, at 387, 401.

137. H. Bull, The Anarchical Society: A Study of Order in World Politics 317 (1977).

Law, in either a domestic or international setting, presumes a certain commonality within the community to which it applies.[138] Communities within states evidence considerable cultural diversity, but support legal orders nonetheless. The cultural diversity found in states has increased in the twentieth centuries as states have come to encompass a greater number of persons of different cultures. The United States received migrants from Europe in the nineteenth and early twentieth centuries, and from Latin America, Asia, Africa and the Middle East from mid-century. In Africa, European colonizing powers drew borders that divided cultures and cast groups representing a variety of cultures into a single political system. Those borders were retained after independence. Despite having people of widely diverse backgrounds, states have managed to maintain functioning legal systems.

International law, it has been said, "rests on a distinctive value foundation that embraces universal human values held in common by all nations."[139] These values represent what can be agreed upon, given cultural differences. In view of the need for cooperation, states endeavor to overcome cultural differences that stand in the way of solutions to pressing problems.[140] Law can function internationally despite cultural differences. The differences need, however, to be taken into account. For example, Westerners read written agreements such as contracts or treaties quite literally, while Easterners are more concerned with the spirit underlying the relationship and are less prone to split hairs; this is a factor to be considered in drafting international agreements,[141] but it does not eliminate the possibility of agreements.

It is important, finally, that a law for the world community not exclude populations that desire to be a part of it. Where original inhabitants of a territory no longer exercise political authority, as in North America or Australia, they must be a part of the community that forms the basis for a world community law, or they must not be considered bound by it. The danger is that they will be considered bound, but will have no effective role in formulating it or administering it.

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138. *Id.*

139. Vereshchetin & Danilenko, *Cultural and Ideological Pluralism and International Law*, 29 GERMAN Y.B. INT'L L. 56, 59 (1986).

140. *Id.* at 58.

141. Dore, *University and Diversity in World Culture*, in THE EXPANSION OF INTERNATIONAL SOCIETY, *supra* note 39, at 408-09.

### *C. Diversity of Political Systems*

It is argued that a community at the world level presupposes a similarity of domestic political orders. Even the unity that presently exists, it is said, has been possible only because of a certain political conformity. "[T]he process by which Asian and African political communities did come to enter into such reciprocal relations and to enjoy full rights as members of international society was inseparable from domestic processes of political and social reform which narrowed the differences between them and the political communities of the West, and contributed to a process of convergence."[142] European integration is taken to show that economic and political integration is possible only on the basis of a commonality in political systems.

Diversity in political orders is likely, however, to remain a feature of the international order for the foreseeable future. While the European system of parliamentary rule has spread to other areas, systems that are religion-based or based on monarchy or oligarchy predominate in Africa, the Middle East, and Asia. The Soviet government initially said that only a limited body of international law could exist between it and other states because of differences in their domestic political orders, but as the twentieth century progressed it entered into a wide range of international-legal relations. Both it and its allied Eastern European states, in the 1980s, moved towards parliamentary rule of the Western European type.

While political similarity facilitates integration at the world level, it is not a prerequisite for a significant level of integration. Moreover, as the perception sharpens that international action is needed to assure survival, differences are likely to be overcome.

### *D. Economic Differentials*

Another obstacle to a world community is the extreme discrepancy in living standards between the developing and developed states. Those states that underwent an industrial revolution in the eighteenth and nineteenth centuries are far ahead of those that did not. Comparing the poorest states to the most affluent, the literacy rate goes from twenty percent to over ninety-five percent, infant morality (per one thousand live births) from 120 to 20, the percentage of the population that is malnourished from thirty-

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142. Bull, *The Emergence of a Universal International Society*, in THE EXPANSION OF INTERNATIONAL SOCIETY, *supra* note 39, at 117, 122.

five percent to virtually none, and life expectancy from the mid 40s to the early 70s.[143] The wealth discrepancy between the wealthiest and the poorest states, moreover, is not diminishing but increasing. It has grown steadily and substantially over the past century.[144]

Large differences in living standards exist, of course, within individual states, mirroring in some instances the degree of difference between the developed and developing states. While it is not impossible for rich and poor to exist in the same political system, the difference imposes a strain. Further, in individual states, no decision was made for rich and poor to come together; the situation evolved over time. For a rich state, it is difficult to decide on greater integration with states that may be a drain on their assets, or whose labor comes cheaper. The entry into the European Economic Community of Spain and Portugal, for example, was difficult because of the two states lower economic levels.

### *E. States as an Obstacle*

De Visscher viewed the likelihood of the development of a community at the international level as a function of the type of state that predominates. "There will be no international community," he said, "so long as the political ends of the State overshadow the human ends of power."[145] He saw the states under national socialism as prone to aggression by manipulating the citizenry, and thus that they were the "born enemy to international organization."[146] His point was that states concerned about their own power are less likely to cede authority in the interest of creating a better world.

In the latter half of the twentieth century, the international order came to include a larger number of states, as colonialism ended in Africa, the Middle East, and Asia. This meant that there were more states to disagree among themselves and made it harder to achieve international consensus on major issues.[147] At the same time, however, it had the effect of spreading power and thus worked against the concentration of power that had existed under colonialism.

Whereas a state is composed of individuals, over whom it can

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143. J. DILLOWAY, *supra* note 21, at 41.
144. S. KIM, *supra* note 30, at 48-49.
145. C. DE VISSCHER, *supra* note 109, at 93.
146. *Id.* at 123.
147. Brownlie, *supra* note 39, at 369.

exercise authority, the states that compose the international order have their own powers of decision-making. Even inside states, however, individuals are not equal actors. Some control more resources and enjoy substantial decision-making power. Large groupings, like major business corporations, play a role in terms of their influence that in some ways is comparable to that of states in the international legal order. Just as states and individuals are not on a par in terms of power in the international legal order, so corporations and individuals are not on a par in the domestic legal order.

International law has long lived with the disparity in power among states. That disparity has caused serious strains, and international law has had to accommodate to the disparity,[148] but it has not prevented the functioning of the system.

## XII. Conclusion

There is historical precedent for the proposition that the dramatic social and economic change of the late twentieth century will lead to a new role for law. The last two major changes in the political-legal order of Europe both occurred at periods of major socio-economic change. The twelfth century saw the emergence of the papacy as a political institution and of the modern Western concept of a legal system.[149] This occurred at a time of technological innovation that transformed productive processes and commerce—rudders on ships, and in agriculture the development of the harness and a sophisticated plough.[150] The next major political-legal change, which led to state sovereignty and separation of powers, occurred in the seventeenth and eighteenth centuries with the Peace of Westphalia, the English Bill of Rights, the Enlightenment, and the French Revolution. This change came at the time of the development of the steam engine and large scale industry, replacing craft production.[151]

In the latter half of the twentieth century, international law increased in the scope of relations regulated, and in processes to effectuate its norms. As international law reformed itself, the nine-

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148. *See, e.g.*, within the United Nations, the allocation to five states of permanent seats on the Security Council, and the right of each of veto resolutions on non-procedural issues. U.N. Charter, arts. 23, 27.

149. H. Berman, Law and Revolution: The Formation of the Western Legal Tradition 86-87 (1983).

150. *Id.* at 520; J. Dilloway, *supra* note 21, at 23; S. Lilley, Men, Machines and History: The Story of Tools and Machines in Relation to Social Progress 49-53 (1966).

151. A. Cassese, *supra* note 40, at 34-37; J. Dilloway, *supra* note 21, at 24-25.

teenth century's bright line between international law and domestic jurisdiction was obliterated. Few realms of domestic legal policy remained immune from international law. The shifting of power relations in the late twentieth century, and the diminution of the superpower conflict as a determinant of international relations, coincided with a perception that the survival of humankind was in jeopardy. That perception forced states to rethink international relations as a common quest for survival. The diminution of the Cold War in the 1980s opened the path to superpower cooperation in resolving the survival issues. Indeed, the superpower conflict that had defined world politics at mid-century was fading as a united Europe and Japan advanced economically. Global solutions that were politically infeasible in the 1970s were realistic by 1990.

The changes and dangers present in contemporary international life require a transcendence of the state as the only decision-making unit. While the state will likely retain a substantial role, increasingly international institutions must set policy, and individuals and non-state groupings must play a role that gives them a sense of responsibility for the world community. The planet is confronted by problems that cannot be solved by individual states acting separately. If the planet is to support life, solutions must be devised in common.