A bird's eye view of international law in the twentieth century: From the Hague Peace Conference to the Kyoto Protocol

1 Introduction

After having had a decade to digest the developments in international law during the twentieth century it may be an opportune moment to give a bird's eye view of these developments. These developments can be roughly divided into four periods: 1899 to the end of World War I; the period between the two World Wars; 1946 to the fall of the Berlin Wall during 1989; and lastly the demise of the Soviet Union to the establishment of the International Criminal Court (ICC) during 1998.

Giving a bird's eye view over a century of developments in international law in a single article is a daunting task. This can only be achieved if the overview focuses on those developments which stand out and does not indulge in gratuitous commentary or theoretical discussion. In what follows the focus will be on the major historical international law developments during the previous century such as treaties, decisions of international tribunals, and the establishment of major international institutions.

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2 1899 to 1918

The two Peace Conferences held in The Hague in 1899 and 1907 were attended by virtually all then recognised states, and can be considered as the first attempt to create a genuinely universal law. These two conferences led to the Law of the Hague which attempted to determine the rights and duties of belligerents in the conduct of military occupations and to limit the manner of warfare. The Law of the Hague attempted to strike a balance between humanitarian considerations and the necessities of war. Worth mentioning is the Fourth Convention of 1907 regarding the Laws and Customs of War on Land (Land Convention), with its annexed regulations known as the Hague Regulations.[1]

The Hague Regulations are today generally accepted as being part of customary international law as was held by the Nuremberg International Military Tribunal[2] and the International Court of Justice.[3] The preamble to the Land Convention, known as the Martens Clause, is also seen to be the advent of modern humanitarian law.[4]

The Permanent Court of Arbitration (PCA) still existing today, was set up pursuant to articles 20 to 29 of the 1899 Convention for the Peaceful Settlement of International Disputes. At the 1907 Hague Peace Conference the PCA was confirmed, and its rules approved. The PCA in reality was not a court but an arrangement to facilitate the appointment of arbitrators. Member states appointed jurists to a panel from which parties to a dispute could select arbitrators. It has survived the creation of the Permanent Court of International Justice and the International Court of Justice, and in 2007 established regional branches in Asia, Latin America and Africa.

World War I was significant in several respects. The spectacle of an all-out war waged by civilised European nations was a major blow for the so-called criteria of civilisation as a standard for admission into the family of nations circle. Colonial expansion also came to an end. With several small nationalistic states emerging after World War I in South-Eastern and Central Europe, it was accepted that the protection of national minorities was vital to maintaining future international peace and order. This was emphasised by the Soviet Union which, following on the Bolshevik Revolution in 1917,

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[1] The texts of the Hague Regulations and other Hague Conventions of 1907 can be found in Roberts and Guelff (eds) *Documents on the laws of war* (2000) (3ed). For those Hague Conventions to which South Africa is bound see Smart 'The municipal effectiveness of treaties relevant to the executive's exercise of belligerent powers' (1987) 8 *SAYIL* at 23, 27.

[2] (1947) *AJIL* at 172.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004 ICJ Rep 136 par 89.

[4] Cassese 'The Martens Clause: Half a loaf or simply pie in the sky?' (2000) *EJIL* at 187.

advocated the principle of self-determination for European national groups and overseas colonies.[5] The principle of self-determination eventually led to a relaxation of some of the strict requirements set for statehood.

The largely Eurocentric League of Nations, which emerged after World War I, made its mark in various ways. The Covenant of the League of Nations banned aggression by undertaking to respect and preserve the territorial integrity and political independence of the members of the League, and adopted sanctions against aggressor states. No definition of aggression was, however, offered.[6]

Article 22 of the Covenant of the League of Nations set up a 'mandates system' to supervise the administration of the colonies of the defeated German Reich and the Ottoman Empire. 'A', 'B' and 'C' Mandates were created and Mandatory states had to submit annual reports to the League Council on their administration. The development of these Mandates to independence played a big role in the development of the principle of self-determination[7] and the development of human rights.

Article 18 of the League Covenant declared that no treaty shall be binding until registered and inspired the drafting of article 102(1) of the United Nations Charter.[8] The purpose of article 18 was to prevent so-called 'secret diplomacy'.

Under the auspices of the League of Nations,[9] the first Conference for the Codification of International Law was held at The Hague in 1930. The object was to provide a codification of the then existing rules on state responsibility for injuries to aliens, territorial waters, and nationality.

The Permanent Court of International Justice (PCIJ) was a successful international institution before World War II, but was not institutionally linked to the League of Nations. The PCIJ was one of the most successful international institutions of the inter-war years. (As neither the Soviet Union

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[5]Focarelli 'International law in the 20th century' in Orakhelashvili (ed) *Research handbook on the theory and history of international law* (2011) at 478, 483.
[6]Baer *Test Case: Italy, Ethiopia and the League of Nations* (1976).
[7]Barrie *Self determination in modern international law* (1995).
[8]'Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it'.
[9]For South Africa's role in the League of Nations see Pienaar *South Africa and international relations between the two world wars: The League of Nations dimension* (1987); Diederichs *Die Volkebond* (1933). According to Dugard *International law: A South African perspective* (2011) (4ed) at 18, South Africa used its position in the League as a means of asserting its independence from Britain.

nor the United States signed the statute of the PCIJ, there were sound reasons for creating a new international court in 1946, the International Court of Justice). In its Advisory Opinion in the 1931 Austro-German Customs Union case[10] the PCIJ concurred with the 1928 *Island of Palmas Arbitral Award*.[11] Here Judge Huber defined sovereignty in the relations between states as 'independence'. He pointed out that independence is the right to exercise, to the exclusion of any other state, the functions of a state. These two decisions must be seen to complement the 1933 Montevideo Convention which provided that a state as a subject of international law should have a permanent population, defined territory, government, and a capacity to enter into relations with other states. This definition is still much quoted and was accepted recently in the South African decision in *Abdi v Minister of Home Affairs*.[12]

Effective occupation with regard to the Arctic and Antarctic could hardly be invoked, and claims to sovereignty in the polar regions were problematic.[13] Effectiveness as a test for statehood was raised and was affirmed in the *Island of Clipperton Arbitral Award* of 1931.[14]

The Aerial Navigation Convention of 1919 laid down the principles regarding freedom of flight over land and sea spaces not subject to national jurisdiction, and the exclusive jurisdiction of the territorial state in the air space over its territory and territorial sea.[15]

Article 15(8) of the Covenant of the League of Nations prohibited the League from interfering in the domestic jurisdiction of member states. This provision was interpreted by the PCIJ in the *Nationality Decrees Advisory Opinion* in 1923.[16]

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[10] *Customs Regime Between Germany and Austria* (*Protocol of March 19th, 1931*) PCIJ Series A/B at 41, 45.
[11] *Island of Palmas Case (United States v Netherlands)* 2 RIAA 829 (1928).
[12] 2011 3 SA 37 (SCA) 51 par 29. See *S v Banda* 1989 4 SA 519 (B) 5040; Booysen *Volkereg en sy verhouding tot die Suid Afrikaanse reg* (1989) at 134; Warwick 'Recognition of states' (1993) *ICLQ* 433; Weller 'The international response to the dissolution of the Socialist Federal Republic of Yugoslavia' (1992) *AJIL* at 569.
[13] Boggs *The polar regions: Geographical and historical data for consideration in a study of claims to sovereignty in the Arctic and Antarctic regions* (1991); De Quintal 'Sovereignty disputes in the Antarctic' (1984) 10 *SAYIL* 61; Barrie 'The Antarctic Treaty: Example of law and its sociological infrastructure' (1975) *CILSA* 212; 'The Antarctic Treaty: Forty years on' (1999) *SALJ* 173. The text of the Antarctic Treaty is to be found in 402 UNTS 71.
[14] (1932) *AJIL* at 390; 2 RIAA 110 (1931).
[15] Convention Relative to the Regulation of Aerial Navigation 1919 (1923) 17/Supp *AJIL* at 195. These principles were later restated and expanded in the ICAO Convention, Chicago 1944 (Convention establishing the International Civil Aviation Organisation (ICAO) 7 December 1944). See Barrie *Die betekenis van die internasionale lugvaartreg in Suid Afrika* (1973) at 57 Inaugural Lecture, Publication Series of the Rand Afrikaans University.
[16] *Dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco* 1923 PCIJ Rep Series B,4 23; 1923 PCIJ Rep Series B 12 32.

The 1920s saw the further banning of slavery, and the banning of trafficking in women and children. In 1921 the Traffic of Women and Children Convention was signed, and in 1926 the Slavery Convention.[17] In 1933 the Traffic of Women Convention was adopted.

Article 227 of the Treaty of Versailles provided for the Allied and Associated powers to publicly arraign the former German Emperor for a supreme offence against international morality and the sanctity of treaties. Provision was made for a special tribunal to try the Emperor. This followed on a 1915 declaration by France, Great Britain, and Russia protesting the mass killings of Americans in the Ottoman Empire.[18]

Mexican nationalisations following on the 1927 agrarian reform, led to a strong reaction by the United States who stressed the 'no confiscation without compensation' principle, and who emphasised that the right to prompt just and effective compensation was a universally accepted principle of international law. (It is a moot point whether prompt, just and effective compensation is still accepted in international law, and whether this approach has not been overtaken by so-called 'appropriate' compensation. The latter will depend on the circumstances of each case taking into account the legitimate expectations of the parties.)[19]

The Kellogg-Briand Pact of 1928 – also known as the General Treaty for the Renunciation of War, or the Pact of Paris – condemned recourse to war as a solution to international controversies, and renounced it as an instrument of national policy. This did not affect the right to self-defence, nor did it deal with measures short of war. Because there was no machinery for collective action against a state which violated its provisions, the Kellogg-Briand Pact had little effect in stopping rising militarism in the 1930s which saw invasions of Manchuria by Japan, Ethiopia by Italy, Finland by the Soviet Union, and Poland by Germany.

Before 1928, international law did not outlaw war or the use of force by states, and Grotius' distinction between a 'just' and an 'unjust' war was not readily accepted by all states. (It was only after World War II that the concept of 'aggressive war' formed the basis of the prosecution of Nazi and Japanese war leaders. The prohibition on the use of force later became a cornerstone of the United Nations system.)

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[17]Allain 'Slavery and the League of Nations' (2006) *JHIL* 213; Miers *Slavery in the twentieth century* (2003).
[18]Cassese *International criminal law* (2003) at 68.
[19]See Hackworth *Digest of international law* vol 3 (1940 1944) at 658; (1938) Supp *AJIL* at 192; *Aminoil case (Kuwait v American Independent Oil Co)* 1982 *ILM* 976; *Amoco Case (US v Iran)* 1988 27 *ILM* 1314.

Notable treaties addressing the conduct of war and the protection of victims of war, saw the light of day in the 1920s. These were additional to the Hague Conventions and Regulations of 1899 and 1907. Examples are the Treaty for the Limitation and Reduction of Naval Armaments, the Hague Rules on Air Warfare, the Wounded and Sick Convention, the Convention relative to the Treatment of Prisoners of War, and the Asphyxiating, Poisonous or Other Gases Protocol.

3 1945-1989

The United Nations Organisation (UN) was created in 1945 replacing the League of Nations. The main focus of the United Nations was the maintenance of international peace and security, and it was empowered to settle disputes that might lead to a breach of the peace. It was also empowered to take collective measures for the prevention and removal of threats to the peace.

In the 1949 *Reparation Advisory Opinion,*[20] the International Court of Justice (ICJ)[21] held that the UN was an international legal person capable of possessing international rights and duties, including the right to bring international claims.

The UN General Assembly set up the International Law Commission (ILC) to codify and progressively develop international law.[22] The ILC has been instrumental in preparing important conventions such as those relating to the law of the sea,[23] the law of diplomatic and consular relations,[24] and the law of treaties.[25]

Also established in 1945, was the Nuremberg International Military Tribunal (IMT).[26] In 1946 the International Military Tribunal for the Far East (IMTFE)[27] was created. Although both tribunals were controversial, their enduring legacy has been the recognition of individual criminal responsibility under

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[20] *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 186.
[21] This is the principal judicial organ of the United Nations. The Statute of the ICJ is incorporated into the UN Charter. The ICJ is not a successor to the PCIJ but a continuation of the PCIJ.
[22] GA res 174 (II) 1947. The text of the ILC Statute is to be found in the *UN year book* (1947 1948) at 211.
[23] Vrancken *South Africa and the law of the sea* (2011); Brown *The international law of the sea* 2 vols (1994).
[24] Denza *Diplomatic law* (2008) (3 ed); Brown 'Diplomatic immunity: State practice under the Vienna Convention on Diplomatic Relations' (1988) *ICLQ* at 53.
[25] 1969 *ILM* 679; Corten and Klein (eds) *The Vienna Convention, the Law of Treaties. A commentary* (2011). See Dugard 'How effective is the International Law Commission in the development of international law?' (1998) 23 *SAYIL* at 34; Watts *The International Law Commission 1949 1998* 3 vols (1999).
[26] Taylor *The anatomy of the Nuremburg Trials* (1992); Mettraux (ed) *Perspectives on the Nuremberg Trial* (2008).
[27] Brackman *The other Nuremburg: The untold story of the Tokyo war crimes trials* (1989).

international law. They also introduced the principle that crimes against international law are committed by men, not by abstract entities, and that only by punishing individuals who commit such crimes can international law be enforced. These Tribunals led to the establishment of other international criminal courts[28] focussing on those responsible for systematic and large-scale violation of human rights.[29] These Tribunals have also contributed substantially to the development of international humanitarian law,[30] such as interpreting the 1948 Genocide Convention, the Four Geneva Conventions of 1949, and the Statutory Limitations Convention of 1968.

The most groundbreaking international law rules in the post-World War II era have been in the field of human rights. The first step was the Universal Declaration of Human Rights (UDHR).[31] This was a recommendatory resolution of the General Assembly and not legally binding on states. Its impact, however, has been immense and it inspired the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). It was invoked by the 1975 Final Act of the Conference on Security and Cooperation in Europe (the 'Helsinki Accord').[32] The UDHR also inspired the European Convention on Human Rights (ECHR) 1950, and the European Social Charter 1961. The ECHR led to the creation of the European Commission on Human Rights and the European Court of Human Rights. The ECHR also led to the American Convention on Human Rights 1969. In 1981 the African Charter on Human and Peoples' Rights was concluded.

The seeds of international human rights planted by articles 1(3), 13, 55(c), 62, 68 and 76 of the UN Charter, developed into the Protocol to amend the Slavery Convention of 1926 (1953); the Supplementary Slavery and Slave Trade Convention of 1956; the International Convention on the Elimination of All Forms of Racial Discrimination (1965) (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); the Convention on the Rights of the Child (CRC) (1989); the Convention Relating to the Status of Refugees (1951); and the Convention relating to the Status of Stateless Persons (1954).[33]

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[28] Such as the International Criminal Court situated in The Hague, See Schabas *The International Criminal Court: A commentary on the Rome Statute* (2010).

[29] The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) established by the UN Security Council under chapter VII of the UN Charter.

[30] An important domestic decision in this regard is *Attorney General of the Government of Israel v Eichman* 1961 36 ILR 5.

[31] General Assembly res 217A (II) 1948.

[32] 1975 *ILM* 1293.

[33] For an in depth discussion of the international human rights conventions see Barrie 'International Human Rights Conventions' in LexisNexis *Human rights compendium* Loose leaf

Rules relating to the protection of victims of war were established on the initiative of the International Commission of the Red Cross in 1949 through the four Geneva Conventions. These four Conventions related to the wounded and sick armed forces on the field (Convention I); wounded, sick and shipwrecked members of the armed forces at sea (Convention II); the treatment of prisoners of war (Convention III); and the protection of civilian persons in time of war (Convention IV). These four Conventions were supplemented in 1977 by two Additional Protocols addressing international and non-international conflicts.[34]

When the international law rules applying to hostilities are at issue, mention must be made of the legality of nuclear weapons. It is difficult to reconcile nuclear weapons with the norms of humanitarian law expounded above. Yet it was only in 1968 that a Treaty on the Non-Proliferation of Nuclear Weapons (NPT)[35] was signed with a view to limiting the spread of nuclear weapons. A number of treaties limiting the testing and proliferation of such weapons are the 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water;[36] the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and the Subsoil Thereof,[37] and the 1996 Comprehensive Test Ban Treaty.[38]

In 1996 the ICJ gave an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.[39] In a most unsatisfactory opinion, the ICJ failed to answer the main question of whether the threat or use of nuclear weapons was prohibited in all circumstances.[40]

Articles 1(2) and 55 of the UN Charter enshrined the principle of self-determination of peoples. General Assembly resolution 1514 (XV) of 1960

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publication service issue at 29, 1B1 1B102; Buergenthal 'The evolving international human rights system' (2006) *AJIL* at 783.

[34] 1977 *ILM* 1391, 1442. Developing countries succeeded in obtaining the inclusion in art 1(4) of the First Protocol a provision equalising, under certain conditions, international conflicts to national liberation wars. In *S v Petane* 1988 3 SA 51 (C) 58A, the question arose whether Additional Protocol I of 1977, extending prisoner of war status to members of national liberation movements, reflected customary international law. The court held that there was insufficient evidence to uphold such a contention.

[35] 1968 *ILM* 811.

[36] 1963 *ILM* 889.

[37] 1971 *ILM* 146.

[38] 1996 *ILM 1439*.

[39] 1996 ICJ Rep 226.

[40] Falk 'Nuclear weapons, international law and the World Court: An historic encounter' (1997) *AJIL* at 64; Barrie and Reddy 'The ICJ's Advisory Opinion on the legality of the threat or use of nuclear weapons' (1998) *SALJ* at 457; Matheson 'The opinion of the ICJ on the threat or use of nuclear weapons' (1997) *AJIL* at 417.

proclaimed the Declaration on the Granting of Independence to Colonial Countries and Peoples which was a landmark development for the principle of self-determination. General Assembly resolution 1803 (XVII) 1962 affirmed the permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination. The principle was also included in article 1 of the ICCPR, the ICESCR, and in the Declaration of Friendly Relations and Cooperation Among States.[41] The principle was eventually articulated by the ICJ in the Advisory Opinions on *Namibia*[42] and the *Western Sahara Opinion*.[43]

In 1982 the Law of the Sea Convention (LOSC) was signed.[44] This was the product of the Third UN Conference on the Law of the Sea which ran from 1974 to 1982. The LOSC brought into being the 'exclusive economic zone' (EZZ) advocated so strongly by the developing countries. Within this 200-mile exclusive zone, the coastal state has sovereign rights for the purpose of exploring, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and subsoil.[45] This EEZ was seen by the ICJ in 1985, as part of customary international law.[46] The LOSC redefined the width of the territorial sea, and provided an updated version of the continental shelf. It also defined the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, as 'Area'. Article 136 declared that the 'Area' and its resources are the *common heritage of mankind*. This concept was extremely contentious, although the Outer Space Treaty of 1967 had already provided that outer space was the province of all mankind, and the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies,[47] declared the moon the common heritage of mankind.

The LOSC obliges states to settle disputes relating to the interpretation of the LOSC peacefully.[48] Where this fails, resort must be had to judicial settlement. Parties then have a choice of forum. They can choose between the International Tribunal for the Law of the Sea (ITLOS); the ICJ; or an arbitral tribunal constituted in terms of the Annexes to the LOSC. This choice is to be made when a state signs or ratifies the LOSC. A special tribunal is also established relating to deep sea-bed disputes, the Sea-Bed Disputes Chamber.

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[41] General Assembly res 2625 (XXV) 1970.
[42] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* 1971 ICJ Rep 16.
[43] *Western Sahara* (Advisory Opinion) 1975 ICJ Rep 12.
[44] 1982 *ILM* 1261.
[45] Franck and Gautier (eds) *The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea* (2003).
[46] *Case Concerning the Continental Shelf (Libya v Malta)* 1985 ICJ Rep 13, 33.
[47] 1979 *ILM* 1434.
[48] Hamman 'Implications of ratification of the Law of the Sea Convention for South Africa: Settlement of disputes' (1997) 22 *SAYIL* at 1.

ITLOS has given various important judgments such as *The M/V 'Saiga', Saint Vincent and the Grenadines v Guinea,*[49] which dealt with hot pursuit, the use of force on the high seas, and the protection of ships' crews.

Various General Assembly resolutions and multilateral treaties attempted to expound a legal regime for outer space. The most significant of these was the Treaty on Principles Governing the Activities of States in the Exploitation and Use of Outer Space, Including the Moon and Other Celestial Bodies of 1967.[50] Important principles proclaimed by this treaty were that outer space is to be free for exploration and use by all states; outer space is not subject to national appropriation; activities in outer space were to be conducted in accordance with international law; no objects carrying nuclear weapons were to be placed in orbit, and states are liable for damage caused to other states by any object launched into outer space.[51]

In 1984 the ICJ, in a landmark judgment in the *Nicaragua* case,[52] held that the prohibition on the use of force set out in article 2(4) of the UN Charter, reflected a rule of customary international law. Problems relating to the use of force were exacerbated by the inability of the UN Security Council to guarantee collective security; the state practice of indirect aggression; the technological transformation of weaponry; and the spread of human rights abuses necessitating the need for humanitarian intervention. Examples are the 1990 Iraqi invasion of Kuwait; the 1991 United States-led coalition attack in Kuwait in 'Operation Desert Storm' backed by the UN Security Council; the UN Security Council peacekeeping operation in Somalia with UNOSOM I (1992) (changed to UNOSOM II (1993)) with disastrous results; the UN Security Council-authorised use of force in Haiti in 1991; and the NATO bombing of the Federal Republic of Yugoslavia in 1999. No action was taken during the 1994 genocide in Rwanda, or the 1995 genocide in Srebrenica.[53]

An important development in the area of international trade was the establishment of the World Trade Organisation (WTO) in 1985. The WTO brought into being a broad body of multilateral trade rules covering goods, services, and intellectual property rights. It also significantly put in place a

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[49] 1999 *ILM* 1323. See Eiriksson *The International Tribunal for the Law of the Sea* (2000).
[50] 610 UNTS 205; 1967 *ILM* 386.
[51] Christol 'International liability for damage caused by space objects' (1980) *AJIL* at 346. See the Convention on International Liability for Damages Caused by Space Objects 1971 *ILM* 965.
[52] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* 1986 ICJ Rep 14. See Franck *Recourse to force. State action against threats and armed attacks* (2002).
[53] See Strydom 'The responsibility of international organisations for conduct arising out of armed conflict situations' (2009) 34 *SAYIL* at 101.

dispute settlement mechanism which has proved its effectiveness.[54] The WTO Agreement incorporates the 1947 General Agreement on Tariffs and Trade (GATT), but does, however, go beyond the 1947 arrangements in some important aspects.

4 1991-1999

The latter part of the twentieth century saw an increase in the number of international humanitarian and criminal law decisions.[55] The most important advancement in international criminal law, however, was the establishment of the International Criminal Court (ICC) in 1998 by the Rome Statute.[56] This is the first permanent international court to prosecute perpetrators of the most serious crimes of concern to the international community. These are genocide, crimes against humanity, and war crimes.[57] The ICC is based on a treaty (the Rome Statute) rather than being imposed on all UN member states by the UN Security Council. The ICC's establishment implies that political leaders may be prosecuted for the most serious international crimes including hijacking, hostage-taking, torture, seizure of ships on the high seas; and the emergence of international drug cartels. This led to a conviction that international law had progressed to a point where individuals could be tried before an international criminal court for violating international norms. Before the ICC, the Security Council in 1993 established the International Criminal Tribunal for the former Yugoslavia (ICTY), and in 1994 the International Criminal Tribunal for Rwanda (ICTR) under Chapter VII of the UN Charter. These two Tribunals made an extraordinary contribution to the development of international breaches of human rights, and created a template as to how an international criminal court should function. International humanitarianism started generating calls for tyrants to be held accountable on the basis of the emerging 'responsibility of sovereigns to protect doctrine'. The impetus for such action stemmed from the *Pinochet* decision of the House of Lords in 1999.[58] The questions raised by the *Pinochet* case include how long the rule of customary international law imposing sovereign immunity for acts performed *iure imperii* can remain intact.[59]

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[54]Petersman (ed) *The GATT/WTO Dispute Settlement System: International law, international organisations and dispute settlement* (1997).

[55]*Prosecutor v Tadic* 1996 *ILM* 32; *Kayishema and Ruzindana Case* ICTR 96 1 T, T Ch (21 May 1999). See Morris and Scherf *An insider's guide to the international Criminal Tribunal for the Former Yugoslavia: A documentary history and analysis* (1995); Scheltema and Van der Wolf (eds) *The international Tribunal for Rwanda: Facts, cases, documents* (1999).

[56]1998 *ILM* 1979. Schabas *An introduction to the International Criminal Court* (2004); *The International Criminal Court: A commentary on the Rome Statute* (2010).

[57]Defined in arts 5 8 of the Rome Statute. South Africa has incorporated the Rome Statute into its domestic law by means of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

[58]*R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No 3)* 1999 2 All ER 97 (HL).

[59]Lutz (ed) *Prosecuting Heads of State* (2009). Since Pinochet, the French Court of Cassation accorded immunity to Gadaffi who was charged with international terrorism by virtue of his

International humanitarian law was strengthened during the last few years of the previous century with the 1993 Convention on the Prohibition of the Use of Chemical Weapons,[60] the 1998 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may deemed to be Excessively Injurious or to have Indiscriminate Effects,[61] and the 1997 Convention on the Prohibition and Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.[62]

The enormity of the challenge to put an international legal regime to protect the environment in place, was realised during the last two decades of the previous century. The end of the twentieth century saw international environmental law consisting of customary law (the rules of state responsibility) and various multilateral treaties. This was complimented by various United Nations resolutions, declarations and guidelines set by international organisations. An important international organisation to emerge was the United Nations Environment Programme (UNEP) which is based in Nairobi.

A network of multilateral treaties to protect the seas, land, rivers, atmosphere, outer space, fauna and flora, and to prohibit ultra-hazardous activities that threaten the environment, were signed. The Convention on Biological Diversity[63] of 1992 aimed to halt the loss of biological diversity is one of the more important treaties. Other important treaties are the 1995 Convention on the Conservation and Management of Straddling Fish Stocks;[64] the 1985 Vienna Convention for the Protection of the Ozone Layer;[65] the 1992 Framework Convention on Climate Change (FCCC);[66] the 1994 Convention on Nuclear Safety;[67] the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[68] the 1997 Convention on the Non-Navigational Uses of International

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being an incumbent head of state. Milosovic was put on trial before the ITCY. Charles Taylor is presently being judged by the Special Court for Sierra Leone (SCSL). The ICC issued a warrant for arrest for Al Bashir, president of Sudan, in 2009.

[60] 1993 *ILM* 800.

[61] 1998 *ILM* 1218.

[62] 1997 *ILM* 1507 (Landmine Convention).

[63] 1992 *ILM* 818. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 1973, regulates trade in endangered species 1973 *ILM* 1085; See Cowling and Kidd 'CITES and the conservation of the African elephant' (2000) 25 *SAYIL* at 189.

[64] 1995 *ILM* 1542.

[65] 1987 *ILM* 1529.

[66] 1992 *ILM* 849. In 1997 parties to the FCCC adopted the Kyoto Protocol (1998 *ILM* 22) which required parties to ensure that their aggregate anthropogenic carbon dioxide emissions of greenhouse gases do not exceed assigned amounts.

[67] 1994 *ILM* 1514.

[68] 1989 *ILM* 657.

Watercourses.[69] The relevance of rules protecting the environment of international watercourses was brought to the fore by the ICJ in the *Gabcikovo Nagymaros Project* case.[70]

One of the most important principles of international environmental law introduced late in the previous century, is that of sustainable development. The impact of this principle has acted as a driving force for the emergence of new legal rules and has been instrumental in effecting important structural transformations. As the principle stands today, it expresses an objective which will be articulated through more specific principles, rules and institutions, in order fully to develop its inherent normative potential.[71] The concept integrates three complementary dimensions: a dimension tied to economic development; an environmental dimension; and a social dimension. The South African Constitutional Court recently saw the pillars of sustainable development as economic development, social development, and the protection of the environment.[72]

A reference to environmental law the previous century would not be complete without a reference to the 1959 Antarctic Treaty[73] which froze all territorial claims, and the 1991 Protocol on the Environmental Protection to the Antarctic Treaty.[74]

5 Conclusion

At the beginning of the Twentieth Century, international law was mainly concerned with *states* and with *inter state* relations. At the latter end of the twentieth century, international law affected to a large extent *people and their daily lives*. International law became a law governing, directly and indirectly, the lives of billions of people. Governments and their judicial systems started considering international law mandates relating to how to rule and how to

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[69] 1997 *ILM* 700. For a list of environmental treaties to which South Africa is a party see Olivier 'International environmental law: Assessing compliance and enforcement under South African and international law' (2008) 32 *SAYIL* at 184. See further Couzens 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' (2005) 29 *SAYIL* at 128; s 231 of the South African Constitution of 1996 and s 79 of the National Environmental Act 107 of 1998.

[70] 1997 ICJ Rep 7.

[71] Vaughn Lowe 'Sustainable development and unsustainable arguments' in Boyle and Freestone (eds) *International law and sustainable development* (1999) at 30.

[72] *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Mpumalanga Province* 2007 6 SA 4 (CC).

[73] 402 UNTS 71.

[74] 1991 *ILM* 1455. South Africa by the Antarctic Treaties Act 60 of 1996 has incorporated the Antarctic Treaty; the Protocol on Environmental Protection to the Antarctic Treaty; the Convention for the Conservation of Antarctic Seals (1972) and the Convention on the Conservation of Antarctic Marine Living Resources (1980) into South African law. See Barrie 'The Antarctic Treaty forty years on' (1999) *SALJ* at 173.

pursue what is universally accepted as justice. From focussing on states at the beginning of the previous century, the end of that century saw international law focussing on socio-political and ethical issues.

The Hague Declaration IV of 18 November 1899, concerned itself with projectiles diffusing asphyxiating or deleterious gasses. In 1997 the parties to the Framework Convention for the Protection of the Ozone Layer adopted the Kyoto Protocol, requiring parties to ensure that their aggregate anthropogenic carbon dioxide emissions of greenhouse gasses, do not exceed assigned amounts. In 1899 war was still the game of kings. The end of the twentieth century has shown that the interdependence of states is paramount, and that very few matters remain domestic affairs.

Between the Hague Conferences of 1899 and 1909, and the Kyoto Protocol of 1997, international law has expanded and transformed itself. Between *ad hoc* conferences and international organisations, a vast network of multilateral treaties between states which touch and concern every form of human endeavour and every human need in which governments have an interest, have been concluded. As the twentieth century progressed, the forms of cooperation between states continued to increase and diversify.

The unavailability of the sea to anything resembling physical occupation, contributed to the doctrine that the sea is free and common to all. When the sea-bed became exploitable and worth exploiting, a multilateral treaty came into being declaring that an exclusive claim may be made to the continental shelf adjacent to the shores of states. This is a noteworthy example of the expansion of international law.

The transformation of the position of the individual in international law during the twentieth century is a remarkable development. At the onset of the previous century, the individual featured only in very limited circumstances in the international law arena. At the end of the previous century, the individual may be held responsible for offences against international peace and order, and may be tried and punished under an international procedure.

The proliferation of multilateral treaties, and the constant expansion of the circle of their parties, may create the impression that the influence of customary international law has diminished. This is not so. Although it must be conceded that the vast body of rules of international law are nowadays originate from treaties, and that the trend towards codification may be irreversible, treaty law is not replacing customary law. More often than not, treaty law in the previous century added to customary law. Customary law retains its binding force – unless a collective treaty abrogates it, or introduces a new rule which contradicts the customary rule. There is, at the advent of the

twenty-first century, no binding rule of general international law which does not involve custom. *Usus* (settled practice of states) remains a cardinal principle of customary law and not the rhetoric of states.

Could one say that international law is now universal? Was it one and the same thing for all states? Normatively it was, but in terms of sociological reality there were clearly differences in the understanding of international law.[75] A classic example is the monist or dualist approach[76] which indicates how countries regulate the interrelationship between their domestic and international law. Another example is international human rights law. Despite what the treaties say, the parties to the treaties interpret their commitments in different ways.

What about regional arrangements? The main regional arrangements are the Organisation of American States (OAS), the African Union (AU), the Arab League, and the European Union (EU). Is there an OAS law, an AU law, an Arab League law, and an European law? The answer is no. These are but separate rooms in a larger house. There cannot be a regional international law beyond or outside the edifice of a universal international law.[77] A recent study on a possible fragmentation of international law by the International Law Commission (ILC) came to the conclusion that universal (general) international law has ways and means of dealing with the issue of fragmentation.[78] According to this ILC study, regional fragmentation does not endanger the universality of international law.

In the long run, the universality of international law can only be built on common values. It is these common values which have led to the unparalleled expansion of international law in the twentieth century.[79]

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[75]See Malksoo 'International law between universality and regional fragmentation' in Orakhelashvili n 5 above at 456, 458. See Kennedy 'The discipline of international law and policy' (1999) *Leiden JIL* 9, 12 who states that international law is different in different places.
[76]Monists argue that domestic courts are obliged to apply rules of international law directly without the need for adoption by the courts, or transformation by the legislature. Dualists see international law and domestic law as completely different systems of law, with the result that international law may be applied by domestic courts only if adopted by such courts or transformed into law by legislation. Article 232 of the South African Constitution provides that customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament. Article 231(4) of the South African Constitution states that an international agreement does not become part of domestic law until it is enacted into law by national legislation. This is in accordance with the pre 1996 Constitution position set out in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 3 SA 150 (A). See *Azapo v President of the Republic of South Africa* 1996 4 SA 671 (CC) 688 par 26; *Progress Office Machines v SARS* 2008 2 SA 13 (SCA) par 6 and the minority judgment of Ngcobo CJ in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC) 347 par 92.
[77]Malksoo n 75 above 457.
[78]ILC 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' A/CN 4/L 628, 13 04 2006. See Dugard n 9 above at13.
[79]Bozeman *Future of law in a multicultural world* (1971).

International law at the end of the previous century became an indispensable body of rules regulating relations between states, without which it would have been virtually impossible for them to have had regular intercourse.[80] At the beginning of the previous century, states had to rely on the slow process of custom. At the waning of that century, the exigencies called for a much speedier method of creating international law. It became clear in the twentieth century that international law was not mainly concerned with peace or war, but also with deportation, extradition, nationality, extra-territorial application of legislation, interpretation of treaties relating to commerce, finance, transport, civil aviation, human rights, the environment, nuclear energy, international terrorism, and a vast array of other subjects.

Despite the vast strides made by international law the previous century, the debate continues as to the obligatory character of the rules of international law. Why do states recognise international law as binding on them? This question posed by Sir Gerald Fitzmaurice half-a-century ago, remains relevant,[81] and has not been adequately answered despite the phenomenal development of international law the previous century. The basis of the source of the international legal obligation must, according to Dugard, still be found in some source other than the prospect of enforcement.[82] As seen by Shearer, the ultimate reasons that impel states to uphold the observance of international law belong to the domain of political science, and cannot be explained by a strictly legal analysis.[83] This debate continues to run like a thread through the history of international law. A single explanation of the source of the international legal obligation, even at the advent of the twenty-first century, defies clear articulation.

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[80]Shearer *Starke's international law* (1994) (11 ed) 14.
[81]Fitzmaurice 'The foundations of the authority of international law and the problem of enforcement' (1956) *MLR* at 1, 8 9.
[82]Dugard n 9 above at 9.
[83]Shearer n 80 above at 14.
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