

# **Evolution of International Law: Two Thresholds, Maybe a Third**

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## **Abstract**

International law is a singular exception to the top-down systems of law within nations. It presents the puzzle of how the law can be created or changed in the absence of authoritative rule-making institutions. The present paper is part of a work in progress that locates the law-making apparatus of international law in a complex adaptive system. Herein the focus is on thresholds. The first and most detailed threshold describes the emergence of the complex adaptive system. The second threshold consists of the transformation of international law from the voluntary to the automatic. The third threshold is here but has not yet been crossed: actualizing human rights as enforceable claims by individuals against States.

## **First Threshold: Emergence of a System**

International law is about States just like corporate law is about corporations. Only the entities count, not the people in them. Today we are on the brink of a threshold that could introduce real people into the international legal system. The first threshold was crossed some four thousand years ago when a legal system emerged from the anarchy of interstate relations. A second occurred some five hundred years ago when the legal system changed from voluntary to compulsory.

To see how thresholds happen, we have to analyze the puzzle of how international law is made. Law-making is usually conceived as a top-down projection of authority—from the governors to the governed. The simplest case is the dictatorship where a group of elites remain in control of a lawmaking apparatus. The elites typically regard themselves as above and better than the masses. Although democracies typically have neither caste nor class, the top-down conception of law remains in place, usually with

various types of feedback such as elections, referendums, or term-limitations on office-holding. If we examine families, condominiums, clubs, associations, unions, faculties, or isolated utopian communities, we again find the top-down model of lawmaking.

International law is a dramatic exception to the top-down model. Because governments are so accustomed to being sovereign within their home territories they are averse to ceding any governmental power to other States. Yet neither do they want perpetual war in their external relations. So for four thousand years, with infrequent lapses into war, they have been willing to accept law as governing their external contacts with each other. Law, but not identifiable lawmakers. Concepts, but not people. Thus international law has been, and is destined to be for the foreseeable future, the only available intermediary when disputes arise among States.

Philosophers such as H.L.A. Hart have labeled international law “primitive” because it lacks familiar top-down institutions such as a world parliament, a chief executive, or a world court of compulsory jurisdiction. (Hart, 1961, p. 214) However, the cost of having such institutions is the injection of human irrationality or arbitrariness into the legal mechanism. Much of the power of international law comes from its perceived fairness and coherence. Nor are executive, legislative or judicial institutions necessary for enforcing the law. As we shall see, international law takes care of its own enforcement. It is just as binding and enforceable as national law systems. As Louis Henkin famously wrote, “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” (Henkin, 1979, p. 47) Yet the mechanism of international-law creation and application remain a mystery. The law puzzles of self-organization, self-regulation, and self-enforcement have resisted solution from within-disciplinary linguistic analysis. But explanation has now

become possible using interdisciplinary insights and heuristics from general system theory, autopoiesis, game theory, evolution, emergence, information theory, networks, auctions, chaos and complexity.

### Structure at the Threshold of Anarchy

History’s earliest records reveal that small kingdoms of the Hittites in 2000 B.C.E., fearful of war, entered into non-aggression pacts cast in bronze that named deities to ensure that their treaties would not be broken. The parties seemed to need a top-down authority. For example, a Hittite tablet treaty of the sixteenth century B.C.E. between the King of Hatti and the King of the Land of the Seha River invokes as “witnesses” the Sun-god of Heaven, various named Storm-gods, the Merchant-god, the Moon-god, the Sun-goddess of the Earth, the Deity of the Countryside, the Deity of the Hunting Bag, various named War-gods, the mountain-dweller gods, and the mercenary gods. This summoning of divine witnesses is followed by the injunction that if the king “turns away” from the words of the tablet or “alters” its words, then all the invoked gods shall “eradicate from the Dark Earth” the king, his wives, his sons, his grandsons, his household, his land, his infantry, his horses, and all his possessions. (Beckman, 1999, p. 85). Thus we may draw from the early treaties many interesting imprecations.

In the absence of records, we must start with an invented history based on minimalist assumptions and context. Let us assume a world of just two kingdoms in ~2000 B.C. situated on a fertile plain several miles apart:

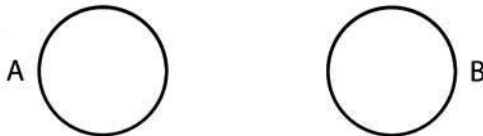


Figure 1.

In kingdoms A and B, each king’s palace is situated at the center of an irregular circle whose circumference indicates the outer reaches of the farms and homes of that kingdom. Since land closest to the king is the most valuable for reasons of military security and proximity to farmers’ markets, population growth tends to radiate outward from the center.

As population increases, the circumference of each kingdom expands until eventually the circles overlap:

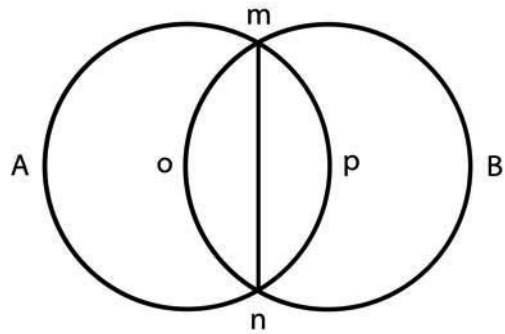


Figure 2.

Within the overlapped area **monp** is a diversity of people who owe their allegiance either to the king of A or the king of B. However the tax collectors for the two kings, who work on commission, will try to extract taxes from all the residents in the overlapped area; they will not believe a farmer who says he has already paid to the other tax collector (every farmer might say this). Conflicts erupt and the two kings, who would rather not have to worry about this peripheral problem but whose revenues are implicated, are inevitably drawn in.

If the conflict escalates into all-out war with one side eventually winning, international law will have failed to get off the ground. But like a successful mutation that we assume occurred in the course of evolution when we observe its progeny, our proof that at least one conflict between two kingdoms was resolved short of war is the existence of international law today.

Accordingly at least one pair of kings came up with the idea of a single border demarcating their regimes (“good fences make good neighbors,” as Robert Frost wrote). In a flat area with no natural borders such as rivers or valleys, boundaries were marked by stones driven into the ground. In Figure 2, the most equitable boundary would be **mn**. But this would assume that A and B had equal power and resources. Given the random distributions of geography on Earth, heterogeneity among nations is almost assured. Nations are always different in size, power, human talent, motivation, and physical resources. Differences within animal species are negligible compared to differences among States: compare the People’s Republic of China with the Republic of Nauru, an island nation of 8 square miles with a population of about 10,000. Heterogeneity has been said to be the key to the construction of a complex adaptive system. (Miller, 2007, p. 14)

Let us assume that one kingdom, call it A, has the larger population while B is militarily stronger, richer, and more industrially advanced. However, B is unlikely to start a war against A. For one thing, war favors the defenders—

“defensive is the stronger form of making war” (Clausewitz, bk. VI, ch. I) –because they can choose the best defensive positions and fortify them. In addition, wars usually end up being cost-ineffective for both sides. Nevertheless, in choosing boundaries, B’s superior power does give it a bargaining advantage. The king of B—call him K(B)—may insist that the border be drawn at **mon**. K(A) then accepts this proposal just to keep the peace.

The mile-markers that are now placed along **mon** signify the factual border between A and B. But there also has to be a normative element that gives stones set in the ground a human interpretation. Thus A and B, by drawing a boundary, have implicitly agreed to two normative principles:

### Implied Rules

1. *There shall be permanent peace.* The boundary would not make much sense without a “permanent” non-aggression pact between A and B.
2. *Boundaries shall be sacrosanct.* The boundary as it now exists shall resist any possible consideration in favor of breaking it.

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If A and B get into a boundary dispute, it could escalate into a war. If war erupts, the boundaries will of course fail as a barrier. It is clear that rules 1 and 2 are so linked together that if one side breaks a rule a threat by the other side to retaliate by breaking the other rule will be futile because the latter rule will already have been broken. Thus the peace may be shattered by a single aggressive act by either side. The relation between A and B is precarious. Perhaps adding more rules will help stabilize their relationship. General system theory informs us that the introduction of complexity may increase stability. For example, a tricycle is more complex and stable than a bicycle, and a bicycle is more complex and stable than a unicycle. (On the other hand, a simple hemisphere flat-side down is more stable than any other more complex three-dimensional structure such as a cube or pyramid.)

### A Lawmaking Conference

Suppose K(A) and K(B) agree to have a lawmaking conference that they believe will increase their mutual security and reduce the occasions for friction that could escalate into war. They might meet over lunch although a formal meeting is more likely. Accordingly we assume that lawyers and officials from both sides submit to the organizers of the conference their nominations for rules in addition to rules 1 and 2 that have already been adopted. Each side submits rules self-interestedly; there is no

altruism at such a conference. However, among the rules submitted some rules are more strongly in the self-interest of one side rather than the other because, as we have seen, the kingdoms differ in power and assets. Thus K(A) will assign a value from 0 to 10 to each rule that is proposed, and K(B) will also assign values that are likely to be different from A’s. In the list of rules that follows, the notation (5, 8) means that K(A) gives a particular rule a bid value of 5 whereas K(B) assigns a higher bid value of 8 to the same rule.

### Proposed Substantive Rules

3. *Immunity of diplomats is guaranteed.* Emissaries increase the flow of information between A and B and help prevent inadvertent war. Since A is more fearful of war than B, A is willing to value this rule more than B. Bids: (9, 4)
4. *Alien property shall be secure against expropriation.* If B buys 40% of a farm in A, B’s property interest is called “alien property.” This rule protects against A’s expropriation or nationalization of B’s property, and vice versa for A’s property in B. Bids: (5, 7)
5. *There shall be a single currency,* The two kingdoms would select one coinage system to serve as their common currency. In fact, B’s stamped bronze coins are already the de facto reserve currency for all trades between A and B. At present K(A) does not care about having such a rule, but K(B) wants to guard against the day that K(A) might compete by issuing its own coins or, worse, counterfeit B’s coins. Bids: (0, 10)
6. *All trade shall be free.* State B needs to import agricultural commodities from A, including food, wool, and cotton. State A imports higher-end products from B but they are not necessities. Bids: (2, 4)
7. *All fugitives shall be returned.* This rule (a precursor to the extradition of today) is found in most of the early Hittite treaties, apparently indicating that kings were very fearful of palace coups. We assume that unsuccessful plotters retreated to a nearby State and attempted to regroup. Thus a high premium was paid to require the nearby State to capture and arrest the fugitives and return them to the home State where they would be arrested and prosecuted. In our present example, K(B) has more to lose than K(A) because B is the wealthier kingdom; hence K(B) places a much higher value on the rule. Bids: (2, 9)
8. *Individuals lose their home-kingdom rights when they enter a foreign kingdom.* This rule, strange as it sounds, is still part of twenty-first century international law. For example, an American tourist who visits France has no rights deriving from the U.S. Constitution; the French government can mistreat her at will. Of course if she is mistreated the American government may intervene diplomatically espousing her claim. But the tourist herself has no right to compel the United States to intervene on her behalf. K(A) places a higher value on having such a rule

because he does not want citizens of B asserting rights or throwing their weight around while visiting in A. Bids: (6, 3)

9. **Denial of justice is prohibited.** An individual from one party may not legally be denied justice by the judicial system of the other party while he is in the territory of that other party. If an individual is nevertheless denied justice (such as being denied a fair trial), his home State is deemed the injured party; however, as in Rule 8, his own incarceration or suffering are not legally cognizable. Bids: (10, 7)

### Summary of Bids

<u>RULE</u>	<u>A</u>	<u>B</u>
3. Diplomats	9	4
4. Security of property	5	7
5. Single currency	0	10
6. Free trade	2	4
7. Return of fugitives	2	9
8. No individual rights	6	3
9. No denial of justice	10	7
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TOTAL	34	44

Suppose the chairperson at the conference reads off each submitted rule and calls for a vote. K(A) will only vote for the rules that favor A or at least favor both sides equally, and K(B) does likewise. The result is that no rule passes, and the conference appears to have been a waste of time. But maybe there is a combination of rules whose bids add up to a total that is equal on both sides.

Suppose the chairperson first reads off all pairs of rules, then all triples of rules, and so on. Toward the end of his recitation, when he is dealing with six-tuples of rules, will he hit on the subset of rules 3, 4, 6, 7, 8, and 9, which turns out to be the only combination of the rules that is perfectly balanced: the total for A and for B is 34. The conference then adopts those six rules by acclamation.

A real-world conference of course would not proceed by quantification. Instead the delegates would argue for weeks or months as to the merits or drawbacks of each rule. The end result would probably be the same as the quantification method. Indeed a combinatorial equation would probably be a good predictor of the rules eventually adopted at a real-world conference.

The six rules finally adopted have the virtue of being interlocked, like a jigsaw puzzle. This makes it hard for either party to violate a particular rule without tugging

against and perhaps upsetting some or all of the other rules. If instead each side valued each rule at 1, then any rule would be detachable without upsetting the others—like removing a side square from a checkerboard. To be precise, if rule 7 on fugitives had been bid at (1,1) and then after adoption one side breaks the rule, rule 7 itself would be terminated (one side would never have a duty to continue to obey a rule that was broken by the other side), all the other rules would not be affected. By contrast, our jigsaw model raises the stakes against the violation of a rule: violating rule 7 could not be precisely compensated short of terminating all five of the remaining rules and thus raising the possibility of war. Therefore under the jigsaw model, but not the checkerboard model, the would-be violator of a single rule can precipitate the ultimate risk of war. This risk should suffice to deter the would-be violator except in those instances where he has already decided that war is in his best interest irrespective of rules or the process of creation of rules by conference. In such instances, no amount of rule-making or promise-making could curb his irrationality.

Because of the heterogeneity previously discussed, the jigsaw model is not accidental; it was forced by the different values A and B assigned to the proposed rules, while the different values were themselves forced by the geographical (including natural assets) differences between the two kingdoms. Now we shall see that heterogeneity makes it possible for international law to be self-enforcing.

If law were not enforced, it would amount to little more than a suggestion that people act or refrain from acting in a prescribed way. To the contrary Hans Kelsen concluded that “law is a coercive order.” (Kelsen, 1949, p. 19) Compliance with the law is not voluntary (as it would be if law were merely a suggestion); rather, compliance is enforced while non-compliance is punished.

International law is enforced not by dropping bombs on the rule-violating State, but by international law itself, which assigns to the violating State an involuntary forfeiture of the benefits of one or more of international law’s substantive rules. Suppose that in a few weeks or months after the conference K(A) begins to dislike K(B) and would be glad to see him overthrown. The quantitative scores on rules 3 through 9 having become public information, K(A) plans to repudiate the return-of-fugitives rule 7 that had a score of (2, 9) because it nets him 7 points. Now international law provides K(B) with a right to retaliate. To begin with, there is always a right to retaliate by disregarding the same rule that was broken against you (rules cannot be partisan). But K(B)’s expected tit-for-tat retaliation will only deliver 2 points of damage to K(A), which leaves K(A) in the superior position of having delivered a net loss of  $9 - 2 = 7$  to K(B). Instead K(B) will choose a rule or rules that maximize the difference in his own favor. He finds that two rules need to be chosen: rule 3 and either rule 8 or rule 9. Here are the gains and losses from A’s viewpoint:

Rule 7 (fugitives) (2, 9)	+ 7
Rule 3 (diplomats) (9, 4)	- 5
Rule 8 (individuals) (6, 3)	- 3
A's total benefits or losses	— - 1

This simple calculation is the first reason why K(A)'s advisers will strongly discourage him from starting a fight with K(B). Indeed, B's retaliation, which is legal under international law and comes with the law's blessing, can always outscore or match A's calculated benefits. Another reason is that if K(A) escalates by violating two rules, K(B) will find other reasons to outscore him. As K(A) pushes hard in violating rules, the retaliation-violation-retaliation progression will end with the termination of all six substantive rules achieved at the conference. The series may then spill over into rules 1 and 2. But violating rules 1 or 2 means that A and B are at war. The slipperiness of the slope toward war will very likely dissuade a rational king from attempting to gain a small advantage by violating any one of the established rules.

A rare real-world event confirmed the centrality of retaliation in maintaining a rule-based order. In 1979 the Shah of Iran was overthrown by Fundamentalists under the Ayatollah Khomeini. The United States had supported the Shah, and in retaliation an angry mob stormed the American embassy in Tehran. Fifty-two American diplomatic personnel were captured and turned over to the Iranian government where they were held in uncomfortable detention. It was the first time in recorded world history where diplomats who had been captured by a mob were held hostage by a government instead of being remitted safely to their home country. The immediate reaction in the United States Department of State was to retaliate on a tit-for-tat basis: arrest all Iranian diplomatic and consular personnel in the United States and hold them until they are exchanged for the American hostages. The next day's newspapers revealed the tit-for-tat plan. But officials in the State Department had already had second thoughts. Nearly all the Iranian diplomats in the United States had been appointed by the Shah. After the Shah was deposed, the Khomeini government would surely question their loyalty to the new regime. Thus it was quite likely that the United States would be doing the Ayatollah a favor by arresting and holding the Iranian diplomats.

Attorneys at the Justice Department spent all night discussing a tit-for-a-different tat strategy. They drafted executive orders freezing Iranian deposits in American banks. The banks—and some cooperating European banks—were only too happy to oblige: they could add the frozen assets to their reserves and lend out a multiple of the reserves at the then-prevailing interest rate of 14% without having to turn the interest over to the Iranians. Approximately \$11 billion worth of Iranian accounts were frozen for the 444 days it took for Iran to cave in and return the hostages unharmed to the United States. Although the principal was returned to Iran, the banks kept

approximately \$2 billion in interest. That extra amount was not “punitive damages” as some analysts claimed, because international law forbids a State from imposing an actual penalty upon another State; penalties because of their subjectivity can cause resentment that could escalate into an irrational war. Instead, the \$2 billion is best interpreted as compensation to the community of States for Iran's dangerously weakening the fundamental rule of diplomatic immunity. Of course, the extraction of compensation re-strengthened the rule (even if the cash went to bankers instead of to an international community fund.) Compared to the physical sciences where a single exception to a rule falsifies the rule, the Iranian case counterintuitively strengthened the rule of diplomatic immunity by showing the world that detailing the hostages cost Iran two billion dollars. (Houghton, 2001)

A political realist might object that the Iranian incident reached a happy result because of the overwhelming military power of the United States as compared to Iran. But doesn't that same incident show Iran's countervailing power in being able to hold the Americans for 444 days? This latter point is generalizable. Although the United States today is the only superpower, if it breaks a rule of international law nearly every other State has the ability to retaliate effectively against it. For the United States has investments all over the world that can be frozen and threatened with expropriation. More importantly, nationals of the United States live, work, and travel abroad in the millions. These “traveling assets” can easily be held as hostage in retaliation for violations of international law by the United States. Indeed, the Iranian case showed the inability of the American superpower to directly rescue 50 of its own diplomatic personnel. Yet from a global perspective, resort to indirect means of retaliation—“tit for a different tat”—serves to strengthen the interlocking rules of international law.

In a rule-based system of international dispute resolution—we are now beginning to see its contours—substantive rules do not simply sit on a shelf waiting to be applied. Instead the system must have rules about rules. These metarules do not explicitly come from conferences; instead they are implied by the conference procedure. So far the following metarules have been generated by implication in the story of the interactions between A and B:

### Metarules

(i) **Equality of Participation:** *All States are equal in participating in the creation of rules of international law.* Without this equality at the outset, either K(A) or K(B) would not have attended the conference. To be sure, at any international conference some delegates will represent the most militarily powerful States whose influence during negotiations may be high in proportion to their strength. But the less powerful States would not attend the

conference at all if the powerful states were to receive extra points simply because of their military power..

(ii) **Equal Protection of the Law:** *The rules adopted at the conference apply to all States equally.* It would be almost unimaginable for a State to agree to an unequal rule. In the domestic courts of Islamic countries, Sha'ria law provides that a woman's testimony in court is equal to one-half of a man's testimony. This is an example of an unequal rule of law, but there is no evidence that the women in those countries ever agreed to it.

(iii) **International law serves only the interests of the aggregation of States.** As we have seen, international law was made by agreement in respect of all of rules 1 through 9. It is the agreement—the combined will of the parties, or the meeting of the minds as it is called in contract law—and not the exclusive (self-regarding) interests of A or B, that eventually resulted in rules binding upon both A and B. International law can only serve inclusive (aggregate) interests; otherwise it would favor or disfavor some States over others and thus violate metarule (ii) on the equality of States.

(iv) **Rule of Reciprocity:** *If one party violates a rule, the aggrieved party may, in retaliation, repudiate that rule. ("tit-for-tat").* This result follows from metarule (ii): equality entails reciprocity. Then we observe that reciprocity entails the right not to continue to be bound by a rule that the other side has broken.

(v) **If a party to a treaty violates one of its rules, the aggrieved party, in retaliation, may repudiate the entire treaty.** This metarule acknowledges the fact that treaties are negotiated and signed as a whole and not piecemeal. Every non-trivial provision of the treaty is part of the package deal that all parties accepted. Article 60 of the Vienna Convention on the Law of Treaties (1969) provides: "A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." Of course, this metarule applies only to the rules within a treaty and not across treaties to rules deriving from other treaties—such as rules 1 and 2 in our current example.

(vi) **The aggrieved party, in retaliation, may repudiate any or all of the other rules in the treaty. ("tit-for-a-different tat").** This metarule follows from metarule (v): if all the rules in a treaty can be repudiated, then a lesser number of rules can be repudiated.

## The Stricture of Structure

In the two-kingdom world of A and B, their mutual promises and interlocking rules will not prevail against an all-out war started by either one. Their bilateral situation is in a sense too determinate, too close to a two-person zero-sum game. However, deciding to start a war would seem riskier if another kingdom, C, were added to the world. It is like the three-body problem in physics: when two bodies

are in orbit, their influences upon each other is determinate and solvable within ordinary calculus, like the zero-sum game between A and B. But if a third body is added, the influences become indeterminate within ordinary calculus. Similarly, among A, B, and C, anyone who starts a war against either of the others cannot predict with certainty whether the third state will join in the war or, if it does, which side it will choose as an ally.

Let us now imagine that a kingdom C is expanding until its outer reaches begin to overlap the boundaries of A or B. But now A and B insist that the boundaries they have previously set up must be respected by C. They will not allow C's territory to overlap with A's or B's. We can safely assume that C will agree to respect the boundaries of A and B; anything less could precipitate a war of two kingdoms against one. If other variables are equal or unknowable, then in a war  $A + B > C$ .

Yet it is unlikely that A and B will grant membership to C in the A-B group simply because C agrees to respect existing boundaries. They will argue that respect for boundaries entails eight other substantive rules all of which have been accepted by A and B and which give shape and dimensionality to the boundaries. In other words, there now exists a package of nine rules: eight substantive rules and the boundary rule. A and B then deny C the right to pick and choose among the existing rules. The reason for this is not selfish but structural. Suppose C rejects the rule of ambassadorial immunity. This rejection will have an effect upon the diplomatic relations between A and B in those cases in which diplomats from A and B are present in C's territory and the question of whether the two ambassadors have to recognize each other's immunity will then depend upon whether the rule of diplomatic immunity between A and B does not apply in C's territory because C does not respect the rule. In short, the network of international-law communications between A and B may be disrupted unpredictably by the mere existence of a third State. (Almost unmanageable complexity arises in the Berne Convention on International Copyright of 1890 that allows States to become members without requiring them to accede to all the previous rules in the Convention.)

Although there are no historical records of a kingdom petitioning two other kingdoms to join their group, we can safely imagine that C acceded to the boundaries, rules, metarules, and conference procedures of A and B and became the third kingdom in their set. We can also safely assume that many other kingdoms, later called States, formally joined the existing group and acceded to its rules. These assumptions are safe because the historical record does tell us that international law "caught on" over time and was increasingly used as a lingua franca by an increasing number of States.

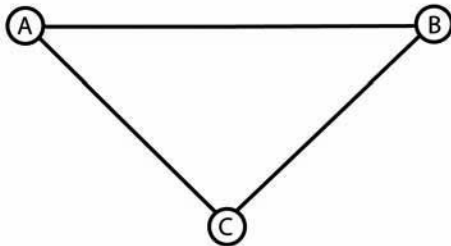
Prior to C's accession, the two existing kingdoms had a line of communication (through diplomats) between their governmental centers:

Figure 3



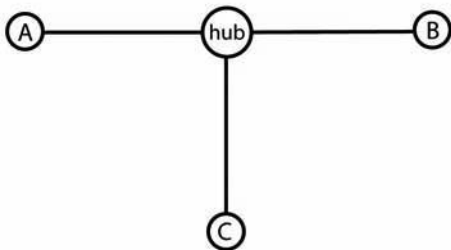
In the process of joining the group, K(C) had to petition K(A) and K(B) separately:

Figure 4



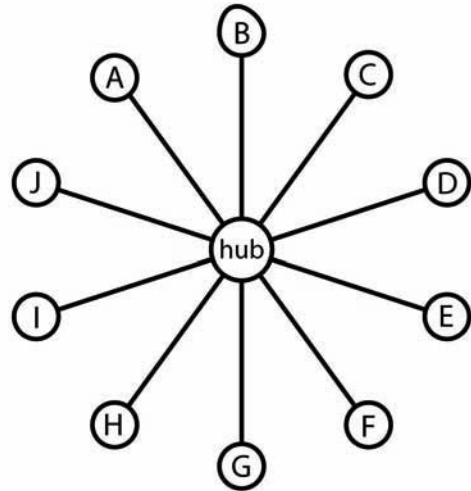
But this configuration will not last long. It requires, for example, that if C is negotiating with B and C tells B what A said to C, B can respond by saying that what C is telling B that A said does not correspond in all details with what A told B. Thus sooner or later all three kingdoms will reconfigure their communication network to look like this:

Figure 5



Thus the kingdoms have arrived at a scale-free star topology (Barabasi, 2002, p. 103) When other kingdoms join the group, a simple topological transformation that preserves the original proximity of A, B, and C, results in the following:

Figure 6



And now the first threshold has been crossed. The International Law System (henceforth “ILS”) has emerged and can be identified. It consists of the communications relating to international law that are transmitted through the star network. All laws are, of course, communications (Luhmann, 1992) International law is the subset of “law” whose messages derive from official representatives of States and refer to international law explicitly or by clear implication. For example, a message from G’s coast guard to J’s vessel on the high seas requesting to board and search the vessel for narcotics is a communication that involves international law by implication. But a message from D to F announcing a ten per cent increase in the foreign aid D will give to F is irrelevant to international law.

### Summary of the ILS

The purpose of the emergent ILS is to avoid war. Anarchy (war) is the absence of order (law). The ILS incorporates the inclusive interests of the States. Let us picture an assembled jigsaw puzzle depicting a map of the world. It has 193 pieces because at this writing there are 193 States in the world. A State may decide it has an exclusive interest in starting a war of conquest against its neighbor, as Iraq did in 1990 when it attacked Kuwait. From Iraq’s viewpoint, conquering Kuwait and obtaining its rich oil fields was worth the cost of war. But from the viewpoint of the ILS, a transfer of oil wealth from one State to another is inconsequential, for there remains the same quantity of

oil in the world. Thus the sum of exclusive interests of all the States is that there is no benefit in having a war. But there is a minor cost and a major threat. The minor cost is the consumption/destruction of assets such as oil, military equipment, and explosives. When used for waging war, the loss of these assets is a net cost from the perspective of the ILS. Of far greater importance is the threat: that the war might escalate into total war resulting in world anarchy for that would destroy the ILS itself. Fortunately, in 1990, all the States got together to staff and fund an international army under the auspices of the United Nations that quickly routed the Iraqi army and restored the sanctity of Kuwait's boundaries. The aggregation of States had perceived the threat to inclusive interests that would result if an individual State was able to get away with a war of aggression. As the voice of those inclusive interests, so did the ILS.

The internal machinery of the ILS reflects the processes by which rules are created or modified. It is depicted as a flow chart published elsewhere. (D'Amato, 2005, p. 396 ) The ILS itself may be briefly described as an immaterial construct formed as the resultant of the mental images about international law of hundreds of thousands of State officials, diplomats, public employees who deal with aliens and foreign corporations, attorneys and other international practitioners, scholars and professors of law and even—not to stretch the point too far—their students.

For present purposes the ILS may be viewed as a metaphor for the real-world processes of international-law determination and validation. These processes are all tilted toward promoting order and avoiding chaos. Nor is there space to fill out the argument that the ILS is a complex adaptive system whose goal—like that of all complex adaptive systems—is its own survival. Complex adaptive systems have survival as their goal because they have survived the Darwinian struggle for survival. The reasoning is obviously circular, but at least it points up the fact that survival is an objective rather than a subjective function. Complex adaptive systems do not survive because they chose to survive; rather, those who lacked the goal of survival were extinguished in the Darwinian evolutionary process. (The fittest are those who have survived.) A few paragraphs earlier it was stated that the purpose of the ILS is to avoid war. We now see that this is equivalent to the ILS's ensuring its own survival, for the ILS can only be destroyed if world order is replaced by the random forces of anarchy.

In order to survive, the ILS manipulates its environment to make it a more congenial place in which to survive. Humans manipulate their environment when they build houses to live in; in building a dam, beavers manipulate their environment. Since the output of the ILS is simply a message about law, the ILS makes sure that the message is conducive to dispute resolution rather than to the continuation or escalation of the dispute.

## **Second Threshold: From Voluntary to Automatic Membership**

In the early days of international law, once an ILS had emerged from among three or more States, other States voluntarily joined it by accession—that is, they acceded by word or deed to all the rules and metarules of the ILS. The ILS can be envisaged as a social club with States as its members. From its own perspective, the ILS is an inclusive rather than an exclusive club. The more States that joined, the less the ILS had to worry about outliers starting a war. But perhaps the most important reason for the growth of the ILS was that its legal rules supported the self-interest of the aggregate of States. Almost as important was that the rules of the ILS were fair: they treated newcomers as if they were oldtimers. It was indeed rare for a State to complain about any of the rules of the ILS. To be sure there were times when a State's individual exclusive interests clashed with the inclusive interests of the aggregate of States. But this is also true of any would-be lawbreaker in national systems. As Diderot said in his Encyclopedia, a thief may rail against the law of private property but if his theft is successful he wants his newly acquired goods to be protected by the same law. Similarly States from time to time may desire temporary exemptions from rules of international law, but they still share part of the inclusive interest in maintaining those rules. No State has ever attempted to opt out of the ILS.

If we analyze the rules of the system, we find that they are two-sided like a coin. On one side a rule is an entitlement; on the other side an obligation. Thus if a State has an entitlement to freedom of the seas, it also has an obligation not to prevent other States from exercising their entitlements to freedom of the seas.

It is necessary for what follows to give a sense of the scope of international entitlements in order to see their seductive attraction to new States. The list begins with the seven "biddable" principles previously enumerated. (It is a remarkable fact that these same entitlements of 4000 or so years ago remain intact in today's international law.) Add to them other present entitlements, a small sampling of which includes the right to send satellites into outer space, to claim a territorial sea, a continental shelf, and an exclusive economic zone. There is an entitlement to protect nationals abroad, to benefit from protection of the laws of war and rules regulating the conduct of hostilities, and to exert in circumscribed cases a right of extraterritorial jurisdiction. There are entitlements (and corresponding obligations) regarding international servitudes, succession of States, succession of States' financial debts, international rivers, lakes, canals and straits, polar regions, the ozone layer, oxygen depletion, preservation of the global ecosystem, rights and duties of States in outer space, nationality and status of ships, piracy, slavery, international traffic in narcotics, nationality and Statelessness, rights of aliens, asylum, extradition, international communications



including satellites and ‘jamming’ of broadcasts, immunities of States and their agencies and subdivisions, protection of human rights, diplomatic and consular privileges and immunities, status and privileges of international organizations, status of armed forces on foreign territory, limits of criminal jurisdiction, enforcement of foreign judgments and commercial arbitrations, rules governing the interpretation of treaties (entry into force, modification, termination), pacific blockade, reprisals, arms shipments, contraband, relations between belligerents and neutrals, no-safe-haven for terrorists, prosecution of persons for violating laws of war and crimes against humanity, and many other entitlements.

Only States have these entitlements, and then only vis-à-vis each other. There is no doubt that the package of rules was attractive to new States that sought to join the club. There are no separate obligations that could be onerous; rather, all obligations correspond to the entitlements. And all or nearly all the entitlements seem to be advantages that are well worth the obligatory price of extending the same advantages to other States.

The second threshold—from a volunteer club to a compulsory one—began approximately in the eleventh century and was finally crossed in approximately the seventeenth century. No one noticed that there was a threshold that was being crossed. We are today conceptualizing a history that was not conceptualized when it occurred.

Crossing the second threshold consisted of three stages which were overlapping rather than temporally distinct from each other. (1) In the first stage, the formal or at least noticeable process of accession was gradually discarded. New States thought they obviously belonged in the club, and existing club members did nothing to dissuade them. (2) The erosion of the formalities of accession was facilitated by the increasing acceptance of the philosophy of natural law. Writers such as Pufendorf, Grotius, Suarez and Vitoria held that the law of nations was part of the law of nature. (Nussbaum, 1954) Natural law says that persons respect universal laws of social conduct such as the prohibitions against murder, theft, cheating, fraud, rape (as Cicero held), fraud, and breach of contract. The classic writers on international law saw no reason why natural law should not apply to the society of nations. Since it was a universal law, a State had no right to accept it or reject it; a State was simply subject to it. To the extent that natural-law thinking was in the prevailing climate of opinion in the period under discussion—especially in the sixteenth and seventeenth centuries—international law simply was thought to have devolved upon new States.

Under the first two stages just described, it was possible for a State to exist outside the purview of international law as an empirical fact. A State could be identified by having a fixed territory, a permanent population, and a central government. Then there would be a temporal interval before the State might petition to join the international club or be so invited by the club. This procedure was in

accordance with Aristotle’s teaching that description comes before prescription. (Aristotle, Politics)

(3) Political realists prefer working empirically. To them there is nothing wrong with calling an agreement written on paper a “contract.” But a lawyer would withhold the term “contract” unless the agreement satisfied certain legal requirements (such as having “consideration.”) A dying man may dictate his last will and testament to his secretary, but a lawyer would refuse to call it a will unless the testator’s signature was attested by independent witnesses. The differences between realists and lawyers came to a head with the signing in 1648 of the two Treaties of Westphalia that ended the Thirty Years’ War and the Eighty Years’ War. The numerous parties to the Treaty included many diverse groups that had engaged in the wars. For example, there were Republics (Vienna, Noremburg), Houses (Brandenburg, Brunswick), Kingdoms (Hungary, France), Princedoms (Suabia), Courts (Saxe-Altenburg), Electors (Mayence), and other groups that each had a fixed territory, a fixed population, and a central government. But the Treaty’s general terms (as opposed to its boundary terms) regarded each of these entities equally. The Treaty was simply doing what international law always does, which is to treat its members as equal under the law. It thus became difficult for the political realists to maintain that some of these entities were not yet States. In response the international lawyers took two bold steps: (a) every one of the entities would now be regarded as a State; and (b) because they are States, they are deemed to have accepted the obligations of States under international law. Note that the entities were not asked; they were simply deemed to have asked by operation of law. Having no choice and hardly any qualms, the new entities over time began calling themselves States or Republics.

As Plato had shown at length in the dialogue Cratylus, the name assigned to an object can affect what it means. The international lawyers, by their silent revolution of referring to the Westphalian groups as “States,” used nomenclature to cross a vital threshold in the evolution of international law.

(4) The final step was for the existing States, through the ILS, to assume that all the obligations of international law were automatically thrust upon any entity referred to as a State.

The difference between voluntary membership and automatic membership was slight at the time and hence not prominently noticed. But there is a world of psychological difference between a State that has consented to a body of law and a State which is bound by a body of law by operation of law. The importance of the second threshold is that it takes away the current claim by some neo-isolationist State officials that rules of international law are not binding upon States which have not consented to them. This claim is doubly wrong. First there has never been a legal system that allows its subjects to pick and choose the rules they wish to obey. And second, although it was true in the early formative years of international law that the

law as a whole was only binding on States that had consented or acceded to it, such a position is no longer defensible since the crossing of the second threshold sometime in the seventeenth century.

### **Third Threshold: Is the Locus of Rights Shifting from States to Individuals?**

International law can hardly be criticized for its longevity or its success, but it can be criticized for its shortcomings. Prior to 1945 a state could do anything it pleased to its nationals within its own territory. When in the 1930s Stalin presided over the murder of ten to twenty thousand farmers (the kulaks) it was not even front-page news in magazines and newspapers of other countries. At the Nuremberg trials of Nazi leaders after the war, no penalty was assessed for commanding the Holocaust against Germany's own Jewish nationals. The international-law concept of "domestic jurisdiction" has always excluded the activities of states within their own territories against their own people. Article 2 paragraph 7 of the United Nations Charter provides that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

It is a mistake to read the Charter as granting an international-law exemption for domestic jurisdiction. The more accurate interpretation would be that since international law from its inception applied only to matters between two or more states, it never extended to matters that involved just a single state. Thus what a state does to its own nationals within its own territory has no international element, and for that reason lies entirely outside the jurisdiction of international law. On the other hand, if there is an international element—for example, a state in its own territory harms a national of another country—then international law *is* implicated. A denial of justice (when a state gives an accused alien a deliberately unfair trial) has been prohibited by international law for five centuries as evidenced in Vattel's *Law of Nations* which the framers of the U.S. Constitution regarded as the most authoritative textbook on international law.

Yet after World War II there arose a sea change in the attitudes of people around the world that has become known as the human rights revolution. At the top of the list of human rights was the prohibition against genocide—a direct result of the dissemination of knowledge about the Holocaust. There were many other rights listed in the Universal Declaration of Human Rights including prohibitions against slavery or torture; the right to work, to education, and to own property; freedom of speech and travel; and the right to fully and freely consent to a marriage partner.

These rights would hardly be human rights if they applied to every state except a person's home state. Thus the very idea of a human right must apply to all persons wherever they happen to be. But this idea clashes directly with international law which, as we have seen from its beginnings, exerts an exclusive state-based jurisdiction.

With the catalytic effect of television and the internet, the probability of strengthening human rights seems high. However, very few human-rights violations—perhaps less than one per cent—involve aliens who visit or work in other countries. Ninety-nine percent affect persons who are nationals living at home. Nearly all the demonstrators at Tiananmen Square in 1989 were Chinese nationals. Women who have been punished for driving cars in Saudi Arabia were all nationals of that country. Girls who are the victims of female genital mutilation invariably are nationals of the countries where the coercive practice takes place.

Under international law, the state is the locus of entitlements. Individuals have no international-law right against their own government (they may have some Constitutional rights depending on the state's Constitution). At the present time we are at the threshold of determining whether individuals have rights against their own governments for governmental acts that result in human-rights violations. One such right has already been established: the right against government-sponsored genocide. When genocide occurs, other states now have a right to intervene militarily in the state that is commanding or condoning genocide. This development has not gone so far as to give victims of a campaign of genocide the right to require (in some way) a foreign state or states to intervene in the victims' state.

### **Conclusion**

The lyrics of a popular song of a few decades ago asked what happens "when an irresistible force meets an immovable object," and answered its question in the title of the song: "Something's Gotta Give." It is up to the ILS, as it always has been, to protect the state-based system. But the protection it gives has invariably been one of accommodation rather than confrontation. It is probably safe to bet that the international legal system will figure out a way to extend more and more human rights to the people. The boundaries of states may have to become permeable, but they can still be boundaries. Governments may have to relinquish certain powers over their citizens, but they can still govern over multitudes of issues. There is no insurance that this third and most important threshold will be crossed without precipitating a "war of civilizations," but short of a guarantee there is a reasonable hope based on the way international law has evolved in the course of four

millennia without abandoning its fundamental rules or its methods of dispute-resolution.

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