

# The Evolution and Transformation of International Law

Developments in International Law,  
from the Peace of Westphalia  
to the Post-United Nations Charter

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## PREFACE

After traveling extensively to several conflict zones in Africa to witness first-hand the impact armed conflicts have on the civilian population and individual civilians, I decided in 2005 to develop a course on International Organizations and International Humanitarian Law for undergraduate students interested in a career in International Law, International Human Rights Law, or International Humanitarian Law. At the time, there was a growing awareness in the international community of atrocities committed against civilians in conflict zones and the response of the Security Council in establishing the two ad hoc tribunals for the Former Yugoslavia and Rwanda, respectively. The world has also witnessed the invasion of Afghanistan and Iraq and the collapse of states like Somalia, Haiti, and Afghanistan. The international community has also created the first permanent international criminal tribunal, the International Criminal Court, in 2002, to prosecute individuals for war crimes, crimes against humanity, and genocide. The international system has also undergone some fundamental changes, following the breakup of the Soviet Union, the collapse of the Berlin Wall, and the dissolution of the Socialist Republic of Yugoslavia. These events transformed the international system, and the world went from a bipolar to a unipolar world with the United States at the head as the sole hegemonic power.

My interest in International Organizations and International Law goes back to my years as a graduate student at Columbia University, where I was greatly influenced by the teachings of men like Oscar Schachter, Oliver Lizzysin, and Friedrich Kratochwil. I was impressed with the optimistic view they held for multilateralism, the United Nations, and international law. I had initially chosen to study in New York because of my conviction that the United Nations was a force for good in the world, and I wanted to know more about the workings of the organization and how I could become a part of it. Growing up in the Caribbean, I developed an early interest in international affairs, as our islands played a crucial role in the European diplomatic history and development of international law. The Caribbean islands became an integral part of European diplomacy and economic transformation. Beginning with the landing of Columbus, to three centuries of European rule, the Caribbean always featured prominently in the history of the world. As slave colonies, the Caribbean sugar production propelled the Industrial Revolution in Europe. Caribbean islands changed hands from one European country to the next, resulting in mixed identities for the islands, a culture that is deeply rooted in the

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African origin of its people and also includes a blend of several other cultures of people who came to the Caribbean to seek profit from its trade routes and strategic location, or those who were brought to the islands as indentured servants following the emancipation of African slaves. One should also remember that the Caribbean, following the Haitian Revolution in 1803, established the first black sovereign state.

International law occupies my primary academic interest, and I have continued to research and write on various aspects of international law. However, having taught a course on both International Organizations and International Humanitarian Law in the United States and the Czech Republic for the past 20 years, I discovered few textbooks that covered the range of issues of interest to students of different backgrounds and experiences. Both in the United States and in the Czech Republic, my classes were truly diverse in terms of nationality and ethnicity. The classes represented a mini United Nations, and it was interesting to see how students interacted with each other and how they shared similar views on human rights, the role of the United Nations, and international law. Students have a generally optimistic view of the above and want to work in any one of those areas to make the world a better place and to improve the human condition, regardless of their country of origin. Students of all nationalities are committed to improve the world and see multilateral cooperation as the only global problem to be addressed. I am always impressed with my American students, whose views on many of the topics in this book differ from that of their government. It gives me hope that they can make a difference once they assume leadership roles in the US Government or in non-governmental organizations.

The COVID-19 pandemic forced us to move all classes online, which disrupted the basic rhythm of the class. However, for students, this was a wake-up call, as it exposed them to know how vulnerable we are and that no country was immune from a global pandemic. Given the Trump administration's anti-immigration rhetoric and his border wall to keep immigrants out, students quickly learned that walls will not keep them safe from climate change, global pandemics, terrorism, and forced migration caused by war and economic inequality. Students also realized that the same technology that has improved their livelihood and also made it possible to continue their studies remotely was having a deleterious impact on our lives. Technology and globalization have made our lives not only easier but also more vulnerable to external forces over which we have no control. As we move to finish the semester online, one student asked me whether I can consider sending them summaries of my notes to make their understanding of the material easier. I was initially reluctant to do so, as I thought it would discourage students from developing their listening and note-taking skills, two critical skill sets necessary for excelling in academe. It was this observation, coupled with being locked down for

an indefinite period, that motivated me to begin this project that now culminates in this book.

This text is a condensed version of the material used in my class. It gives students easy access to a wealth of information about the topics and issues discussed in the courses. Although it requires students to do further reading, particularly if they are interested in a career in any one of the topics, it is a window into the world of International Organizations, International Law and International Human Rights, and International Humanitarian Law.

I am particularly grateful to many of my students from around the world, particularly, Valeria Ruiz Torres, whose quest for knowledge and a determination to improve the human condition inspired me to write this book. The knowledge one will acquire in this book and in my course on the subject will inspire them to become better citizens of the world. Unlike other subjects, International Law transcends borders, nationality, ethnicity, religion, and race. Hopefully, this book and my course will motivate students to consider a career in International Law in order to make our planet a better place for all human beings, to protect the flora and fauna, to promote global understanding, to be a voice for the most vulnerable peoples of the world, and to help improve the human condition worldwide.



# INTRODUCTION

I began writing this book at a critical time in the history of the international system, especially the post-United Nations legal order, when the world is experiencing one of its most difficult challenges in the absence of global leadership. The coronavirus disease 2019 (COVID-19) pandemic is the greatest threat to humanity. In fact, by the time the virus is brought under control, the world will have lost as many people as it lost during World War II. The pandemic which originated in Wuhan, China, is now a global pandemic, which is impacting every country and is having a deleterious consequence on global governance, international economic relations, and international peace and security. The pandemic has caused the worst economic crisis since the Great Depression, and its impact is likely to last much longer than previous economic crises. Millions of people who have lost their jobs are not likely to regain them; businesses that have closed will not reopen or will reopen under a different structure with fewer employees. Technology will play a much greater role in our lives: the way we shop, the way we work, the way we interact with each other, and the way we deliver services such as education.

The international system, as constituted in 1648, gave exclusive autonomy and authority to the sovereign state. According to the Peace of Westphalia, there was no higher authority above the state. The Framers of Westphalia did not anticipate a world in which problems would transcend borders, and we need some semblance of centralized authority to address many of the unintended consequences of anarchy. Today, the international system is being challenged as it has never been before. Although World Wars I and II were dramatic events that transformed the world, we have never seen a similar crisis like COVID-19 in a century. Unlike in previous global crises like the two world wars when nations saw the need to cooperate and to create new institutions to coordinate the policies of nations, this pandemic has been dealt with unilaterally by each state, despite the fact that this is a global pandemic, which no one nation can contain on its own. The absence of global leadership during a pandemic is the biggest failure of today's leaders and their inability to comprehend the threat and to rise to the occasion. Today, the United States, which once carried the mantle of global leadership, has abdicated its leadership role. This is a result of the poor quality of leaders the United States has produced over the years and a bankrupt political system that is too divided to address the critical concerns of its population. The United States has also squandered its wealth fighting unwinnable wars instead of investing in its human capital, infrastructure, research

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and development, and education. Although the United States has withdrawn from its global leadership role, no state has stepped forward to assume that position. Indeed, none of the contending powers are capable of assuming that role. China may have the second biggest economy in the world but its ideology and values are not compatible with the liberal values we have come to appreciate. Russia is a relatively poor country without the means to sustain a global leadership role. Russia's authoritarian political tradition does fit well with the majority of people around the world. The European Union, which many look up to preserve the liberal world order, faces internal challenges that will pre-occupy its leaders for the foreseeable future.

COVID-19 has exposed the flaws in the global legal order. The United Nations has been sidelined in its response to the pandemic. The Security Council discussed the impact of the pandemic on international peace and security but was rather late in its response and took no concerted measures to indicate there was a global consensus on how to contain and mitigate the spread of the virus. During the global AIDS epidemic, and more recently, the Ebola crisis in West Africa, the Security Council responded expeditiously by declaring both the viruses a "threat to international peace and security." This was the right approach, as it led the United Nations to mobilize its resources into containing and mitigating the spread of both diseases. The United Nations also worked with governments, NGOs, and the private sectors to expedite the development and testing of new drugs to treat the viruses. Global coordination helped bring both viruses under control and, to a great extent, almost eradicate them.

Today, the COVID-19 pandemic is forcing us to reimagine the international system and how we as a global community respond to crises that no one state can solve alone. While the world is facing its biggest crisis ever, the world lacks the global governance structure to collectively respond to the pandemic. The World Health Organization (WHO) is the international body established to assist states to coordinate their response to health pandemic, and there has been many. During every health crisis, governments have turned to the WHO for guidance and information on the severity of the pandemic. With this pandemic, the world is adopting individual strategies to respond to the COVID-19 pandemic. A relatively few countries have contained the spread of the virus. But the major powers have been the least effective in managing the spread of infection and the rising number of deaths attributed to the virus. The United States, Brazil, Russia, India, and the United Kingdom have registered the highest number of infections and deaths. This is in part due to the failure of these countries' leaders to listen to the scientific and medical experts who call for increasing testing and tracing, social distancing, wearing of masks in public, and practicing basic hygiene. The inability of these countries to take the virus seriously has caused unnecessary deaths and the failure to contain

the spread of the virus. The United Nations cannot act on its own initiative but must rely on states to grant it the authority to do so. Given that the major powers have not been willing to empower the United Nations, the United Nations can only issue statements about the global impact of the virus and press on states to do more to mitigate the impact of the spread of the virus.

The goal of this book is not to address COVID-19 or to propose models on how the world should come together to combat the virus. My task here is to examine how international law has been applied during different periods in the history of the international system and the role international law has played in advancing and improving the human condition. The book looks at different topics under the rubric of international law and international institutions to elucidate the various issues that have emerged during the history of the international system. The book is written as a general course, which seeks to educate students and practitioners about the intricate nature of international law and international institutions and how they attempt to regulate the critical issues that affect the global community and humanity as a whole.

The issues facing humanity in the 21st century will require a more constructive global approach: Countries should realize that sovereignty is not infinite and that the state can no longer be the sole governing authority in international affairs. Global solutions to international problems will require more than just states if we are to come up with concrete solutions that take into account the interests of all nations and other entities in the world. Global governance cannot be left only to the sovereign state. Multinational corporations, NGOs, and other private actors must be a part of the solution. It is this context that addresses some of the critical issues of international law, international organizations, and international humanitarian law; and by the international humanitarian law, I mean just the laws governing armed conflicts, but international law that seeks to humanize the discourse about the plight of human beings, be it in times of armed conflicts or as they navigate their daily lives and interact with other actors in the international system. The current international structure established after World War II has outlined its effectiveness and requires a more robust, inclusive, and more representative of the international system, one that addresses the human condition. COVID-19 has exposed us to the multiple worlds that exist simultaneously: the rich and privileged who live in industrialized countries; the rich who live in emerging economies; the shrinking middle class who live in both rich and poor countries; the working poor, who get by scrapping a living by selling their labor for minuscule pay and live in the *favelas* and shantytowns on the periphery of major urban centers; the urban poor (essential workers), who perform the daily chores to keep the service sector functioning; immigrant workers, who work in the agricultural sector; and the other marginalized workers, who work in care homes, domestics, and the health



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services sector. There is also the rich/poor country divide that is not sustainable in the future. The world needs to be reconfigured that all people can earn a livable wage and live decently.

The post-COVID-19 world ought to refocus attention on basic human needs and make poverty alleviation, respect for human rights, fairness in international institutions, environmental sustainability, and global awareness and tolerance the basis of the future international legal order. This is a tall order, but leaders must have the courage and vision to make it happen. The concept of the sovereign state is one model that was seen at the time as a solution to a European problem. However, the concept is now global and is certainly an alternative to colonialism. But this conception of world order, although still relevant in certain situations, is obsolete and incapable of meeting the needs of a world in the 21st century. The concept of sovereignty is meaningless in a globalized world, where borders have become porous and technology is increasingly challenging the ability of states to insulate themselves from problems such as climate change, pandemics, mass migration, internal armed conflicts, and economic dislocation. The future international legal order is grim but not impossible to restructure. What the world needs is leadership; unfortunately, that is lacking at the moment. COVID-19 has amplified the global divide and has accelerated the nationalistic sentiment that was already on the rise with the election of Donald Trump and Britain's exit from the European Union. Instead of uniting the world, COVID-19 has drawn us further apart.

# 1 THE INTERNATIONAL LEGAL ORDER: A CONTRAST BETWEEN THE WESTPHALIAN AND THE UNITED NATIONS LEGAL ORDERS

## The Evolution of the States System

To understand international law, and international humanitarian law specifically, one must understand the origin of the system of sovereign states and what led to this dramatic revolution in international relations. Most studies of international law begin with a look at the Peace of Westphalia (1648) and what led to that agreement. By focusing on Westphalia as our point of departure, we are not discounting the great civilizations that existed previously or the contributions of non-western peoples to the present system. However, what is unique about the Westphalian system is that it created an entity called the sovereign state that is uniquely different from the previous methods used for organizing international society from the very beginning of the history of human beings on the earth.

Westphalia's conception of the sovereign state was intended to create a new entity in order to mitigate conflicts in Europe. It was a solution to a European problem. Westphalia ended the Thirty Years War (1618–1648), a war fought between Catholics and Protestants. By so doing, the agreement severed ties between the new sovereign states and the Holy Roman Empire. The Peace of Westphalia comprised two treaties: the Treaty of Munster, between the Empire of Sweden and its protectorates and allies, and the Treaty of Osnabruck, between the Empire of France and its protectorates and allies.<sup>1</sup> These two treaties took years to negotiate, as the parties had to negotiate from different cities and shuttle between the two places in order to reach compromises. The Westphalian legal order called for abolishing of the Papacy/the Holy Roman Empire, and it gave each individual sovereign state absolute authority over its internal and external affairs. Westphalia was a major achievement toward religious tolerance and secularization in Europe. Westphalia was defined as an anarchical system in which there was no central authority above the states. States operated freely, guided by the principles of sovereign equality and non-intervention by one state into the affairs of another state. Westphalia was cre-

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<sup>1</sup>Leo Gross, "The Peace of Westphalia, 1648–1948," 42 AJIL, (1948), p. 21.

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ated as a highly decentralized system in which each state had absolute jurisdiction over its affairs.

The core principles of the Peace of Westphalia are as follows:

- States are sovereign, independent, and equal to each other.
- States are prohibited from intervening in the affairs of other sovereign states.
- States had a right to self-preservation/self-defense.
- States had a right to remain neutral in a conflict between other states.
- States had a right to diplomatic privileges and immunities, including the officials of the states and their organs.
- People had a right to self-determination.
- States had an obligation to protect the rights of minority religions within their territory.
- States had a right to trade freely with each other.
- All states had a right to navigate the ocean freely, whether or not a state was a coastal or landlocked state.
- A balance of power was to be observed to preserve the Westphalian system.
- The development of International Law was to be secular.
- States had an obligation to settle their disputes peacefully.

The Westphalian legal order was a state-centric order, with limited recognition of individuals as having rights separate and independent from their states. How states treated their nationals was an internal matter. Hence, Westphalia only recognized limited human rights for individuals: the right of self-determination; protection of minority religions; and diplomatic immunities for organs and personnel of the state. However, given the origin of the Westphalian legal order, which occurred at the end of a long war, it would be unthinkable to create a lasting peace unless the rights and protection of the individual were not taken into consideration. Therefore, inasmuch as Westphalia placed tremendous emphasis on the state, it had to be in the back of the minds of negotiators that the rights of the individual had to be preserved as well.

Another flaw in the Westphalian legal order is that it did not extend similar rights and duties to territories beyond the geography of Europe. Westphalia did not recognize non-European peoples, which made up the vast majority of the world. Outside of Europe, territories and peoples had no rights, nor were they granted protection under international law. They were considered “uncivilized,” and their land was classified as “*Terra Nullius*” (Virgin Territory). This allowed European states to ex-

pand and conquer territories in Africa, Asia, and the Americas with impunity.<sup>2</sup> Westphalian International Law gave European states unchecked powers to colonize, enslave, and kill the native populations of these lands with impunity. Under the Westphalian legal order, it was perfectly legal to conquer the Native Americans, kill them, and confiscate their lands. A similar situation occurred against the indigenous populations of the Americas and the native populations of Africa. Westphalian International Law defined non-Europeans as objects instead of subjects of International Law. The peoples of Africa, the Americas, and Asia had no rights and were not recognized as peoples under Westphalian International Law. It is this double standard that led to very violent encounters between Europeans and non-Europeans and planted the seeds of the violence and chaos that still reverberates with us today.

Today, the Westphalian legal conception of world order is universal. The concept of the sovereign state, which was intended to resolve a European problem, is now a global phenomenon. How do we reconcile these two conceptions, the western and non-western world, now combined into a new international legal order? The Framers of Westphalia never intended to grant equal status to the non-Europeans who now comprise the majority of states in what is still considered a European legal order. I will address this contradiction when I examine the United Nations legal order. Meanwhile, the core principles of the Peace of Westphalia remain more popular today than they ever were, notwithstanding the fact that the world has changed and many of the issues confronting the international community cannot be solved through the Westphalian paradigm. Which begs the question: Are the principles of the Peace of Westphalia still relevant? How do we reconcile the diversity of the international system with the principles of Westphalia, especially those of sovereign equality of states and non-intervention, given the vast disparities in power and wealth between the western states and the developing countries? How do we continue to preserve the basic tenets of the Westphalian legal order in the United Nations legal order, in which the concept of the sovereign state operates equally with the concept of human rights for all peoples? Finally, how do we maintain the principles of Westphalia and embrace the principle of global justice and fairness in international affairs, which is at the core of the United Nations legal order?<sup>3</sup>

The Westphalia legal order established the concept of the sovereign state but it did not provide a criterion for statehood. What is a state, and what are the requirements of states? A state is a legal entity with rights, duties, and obligations under

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<sup>2</sup>See Anne Arford, *INTERNATIONAL LAW AND THE OTHERS*, NY: Cambridge University Press, (2006).

<sup>3</sup>See Richard Falk, "The Interplay of Westphalia and Charter Conception of International Legal Order," in Falk, Kratochwil, and Mendlovitz (eds), *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE*, Boulder: Westview Press, (1985), p. 118.

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international law. Simultaneously, the state is a legal fiction. A sovereign state comprises a territory with defined boundaries, a permanent population, a government, and the ability to conduct international relations.<sup>4</sup> However, in order for a state to engage in international diplomacy and enjoy all the rights and duties of statehood, it must be recognized by other states, particularly by the principal actors in international affairs. Some territories meet all the requirements of statehood but are not recognized as states: Kosovo, Northern Somalia, Abkhazia, South Ossetia, Northern Cyprus, and East Ukraine have all declared some form of independence but are not recognized by a majority of states, and hence, they do not enjoy the benefits of statehood. However, there are many territories that are not states. What constitutes a state is a question of international law, as the law gives legal personality to that entity and guarantees its membership into the community of nations.<sup>5</sup>

Although recognition by other states is not a definitive requirement, in order to conduct or participate in international affairs, an entity must be recognized by other states. Additionally, in order to enjoy diplomatic privileges and immunities in the territory of another state, an entity must be recognized as a state. Therefore, recognition is crucial if a state wants to conduct international relations effectively. Non-recognition severely hinders a state from participating in international affairs: It cannot gain membership in international organizations; it cannot establish embassies in the territories of other states where it is not recognized; and it will not enjoy privileges and immunities enjoyed by other states. Recognition restricts entry into the international system and limits the number of states that can be members of this exclusive club. Existing states have used this tool as a weapon against entities they disagree with or do not like the manner in which they came into being. Some governments will not recognize a state or government that came into existence with the assistance of foreign troops. The United States did not recognize the government of Angola for two decades because it came to power with the help of Cuban troops.

To become a state, an entity must invoke international law in making its formal declaration of statehood. Implicit in that declaration is the new state's obligation to respect the sovereignty and independence of other states and a commitment not to intervene in the affairs of other states. International law, therefore, gives legal personality to states. To deny the existence of international law is to deny one's existence as a state. Following a declaration of independence, existing states would then welcome the new state into the community of nations by extending an invitation to establish diplomatic relations. However, before a state can be admitted into the community of nations, it must meet the criteria established above; how-

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<sup>4</sup>James Crawford, *THE CREATION OF STATES IN INTERNATIONAL LAW*, NY: Oxford University Press, (2007), p. 37.

<sup>5</sup>*Ibid.*

ever, some are more important than others. An entity can have a border dispute and still gain admission into the community of states. Or there may be competing governments, and states must decide which one to recognize as the legitimate government. An entity may not have the means of survival as a state or the ability to conduct international relations, meaning it may not have the ability to carry out its international legal obligations. But entities are recognized at the sole discretion of the government of existing states, and there is no legal obligation for existing states to recognize or not recognize a new state. Recognition, therefore, is a political intent, not a legal obligation.<sup>6</sup>

There is a fundamental difference between the recognition of a state and the recognition of a government. When an existing state recognizes a new state, the act is permanent. That recognition remains regardless of the changes in government. However, recognition of a government can be withdrawn, as we saw when the United States and several of its allies withdrew their recognition of Nicolas Maduro as the president of Venezuela and recognized Juan Guaidó as the interim president.<sup>7</sup> Recognition of a regime has to do with issues of legitimacy and the regime's compliance with human rights and its other international obligations. But it does not take away the legality of the regime under domestic law. The people of a state should determine whether their government is legitimate or not. How the regime came to power and its continuing hold on power determines its legitimacy under both domestic and international laws. However, international law is less willing to impose a standard of legitimacy on regimes. Hence, the criteria for statehood simply call for a "government" without defining the type of government it thinks is best for the people of a state. The military junta in Myanmar is the most recent example of a regime that came to power by overthrowing a democratically elected government and has engaged in violence against innocent civilians to keep a grip on power. However, most foreign governments have retained their ambassadors in the capital and have not said whether they would continue to recognize the government of Aung San Suu Kyi.

Membership in the United Nations is something all new states seek. It gives new states an entry into the world of diplomacy. Although UN membership is not a requirement for statehood, it has become almost inevitable that to be fully recognized as a state one needs to be a member of the United Nations. The requirement for membership in the United Nations is quite different from the requirements for statehood. Membership in the United Nations is opened to "all other peace-loving which accept the obligations contained in the present Charter and, in the judg-

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<sup>6</sup>See footnote 4, p. 17.

<sup>7</sup>Scott R. Anderson, "What Does It Mean for the United States to Recognize Juan Guaidó as Venezuela's President?" @ <http://www.lawfareblog.com-what-decoes-it-mean-united-state-recog-nize-juan-guaido-venezuela>.

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ment of the Organization, are able and willing to carry out these obligations.”<sup>8</sup> An applicant state must be vetted before it is admitted, and the Security Council must first approve its membership before making a recommendation to the General Assembly. Hence, a state can be a member of the United Nations but not recognized as a state by some states. Members of the Security Council can block the membership of any state or can refuse to recognize a government as the legitimate government of an existing state. Serbia was denied membership in the United Nations as the successor state to the Socialist Republic of Yugoslavia,<sup>9</sup> and the Pol Pot regime of Cambodia was allowed to retain its seat in the General Assembly, despite serious human rights violations and being responsible for the murder of over one million Cambodians.<sup>10</sup> Similarly, the government of Taiwan was allowed to retain the China seat on the Security Council, while the government of Communist China was not recognized by the United States. Kosovo has also been deprived of UN membership due to the opposition from Russia and China, who refused to acknowledge Kosovo’s independence. Membership in the United Nations has been highly politicized by the permanent members who can wield their veto to block the admission of a state.<sup>11</sup> Failure to be admitted as a state may not necessarily prevent a new entity from participating in UN activities. The General Assembly can grant observer status to any state or state-like entity. It did so during the War of National Liberation in Africa and also for the Palestinian Liberation Organization.<sup>12</sup>

### The Napoleonic Wars and the Concert of Europe

The Westphalian legal order remained relatively intact until the Napoleonic Wars of 1813–1815 when Napoleon challenged the existing order and tried to bring all of Europe under French tutelage. He failed, which gave way to the great powers creating the Concert of Europe. The Concert system preserved the Westphalian order of sovereign states, and it also institutionalized the balance of power and made the great powers the guarantors of the state system, which they would carry out collectively. This gave birth to the collective security system that was incorporated into the United Nations Security Council’s mandate for maintaining international

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<sup>8</sup>CHARTER OF THE UNITED NATIONS, Chapter II, Article 4.

<sup>9</sup>Yehuda Z. Blum, “UN Membership of the ‘New’ Yugoslavia: Continuity or Break?” 86 AJIL, (1992), pp. 830–34.

<sup>10</sup>Don Oberdorfer, *U.S. to Support Pol Pot Regime for U.N. Seat*, WASH. POST (September 16, 1980), p. 1.

<sup>11</sup>See David I. Efevwerdhan, “Kosovo’s Chances of UN Membership,” 4 GOETTINGEN JOURNAL OF INT’L LAW, (2012), pp. 93–130.

<sup>12</sup>See Palestinian Liberation Organization Observer Status, A/RES/3237 (XXIX), November 22, 1974.

peace and security. The Concert of Europe is credited with keeping the peace in Europe for almost a hundred years. However, the same cannot be said for the rest of the world. During the Concert era, the European states fought many wars over control of territories in Africa and elsewhere in the world. The Concert era was the period of European expansionism in Africa (The Scramble for Africa). These conflicts culminated in the Berlin Conference, which led to the partitioning of Africa. The Concert era ended with the outbreak of World War I.

## The International Legal Order of the League of Nations

The end of World War I paved the way for the creation of the League of Nations, which was established at the Versailles Conference of 1919. The postwar legal order established at Versailles was intended to end future wars. It attempted to do so by modifying the Westphalian legal order, by making permanent the collective security system; calling for exhaustion of peaceful negotiations before states go to war; and dismantling some European empires in the Middle East, Africa, Central Europe, and the Balkans. The League also oversaw the dismemberment of the Ottoman Empire. The order established at Versailles called for transparency in treaty negotiations, the adjudication of international disputes, and the rights of self-determination of peoples. The League Covenant was predicated on President Wilson's Fourteen Points. However, the US Senate did not ratify the Covenant, which kept the United States out of the postwar order. The League of Nations created a mandate system to prepare former European colonies and territories from the Ottoman Empire for independence. The League also created a series of agencies to help improve the lives of all peoples and to facilitate cooperation among nations.

Despite its brief tenure and early demise, the League of Nations had many accomplishments, among them is the peaceful repatriation of refugees and the peaceful settlement of boundary disputes, and it facilitated the return of lost territories to the original states. The League was instrumental in the creation of several new states out of the ashes of the Austro-Hungarian Empire and the Ottoman Empire. The League also assured protection of the rights of minorities who found themselves in other countries whose borders were redrawn as a result of the war. The League created the Permanent Court of International Justice (PCIJ), which adjudicated several important legal disputes between states.<sup>13</sup>

The idea of the League of Nations was short-lived, in part because it was closely aligned with the punitive measures imposed on Germany, and several major powers either defied the League's obligations or did not join the organization. The burden of the League of Nations was placed on the shoulders of France and Britain.

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<sup>13</sup>See footnote 1.



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Both had different conceptions of the purpose of the League, and they both lacked the resources to enhance the deterrent effect of the League. The United States did not join the organization because the Senate voted against ratifying the Covenant. Russia was expelled for its invasion of Finland; Japan was expelled for invading Manchuria, China; and Italy was expelled for invading Ethiopia. Following the signing of the Munich Pact with Britain's Prime Minister Neville Chamberlin, in 1939, Germany seized the opportunity to regain the territory it lost in the Versailles peace treaty. Hitler invaded the Sudetenland to recapture the territory it lost after the war to Czechoslovakia. That incident, coupled with other factors, led to the outbreak of World War II.

### The United Nations Legal Order

The United Nations was created in the wake of World War II and was supposed to be a departure from the League of Nations. The Framers of the Charter did everything to separate the United Nations from the League. However, there were some continuities between the two organizations. The United Nations assumed all the responsibilities and institutions of the League, including the PCIJ, and the mandate system. But the United Nations showed a dramatic improvement over the League, which led it to endure for significantly longer periods than the League. The United Nations was also supposed to be a departure from the Westphalian legal order but not a replacement. The United Nations Charter instead complements the Westphalia system in many ways. The Charter preserved many of the legal frameworks of Westphalia: the sovereign state as the principal actor in international relations; sovereign equality of all states; non-intervention in the internal and external affairs of states; peaceful settlement of disputes; the right to self-defense; freedom of the sea; diplomatic immunity for states and their officials; and the right to self-determination. The United Nations also showed an improvement over both the Westphalia and the League of Nations.<sup>14</sup>

During World War II, President Roosevelt and Prime Minister Churchill met in Quebec, Canada, to discuss the idea of a postwar order. At the end of the summit, the two leaders issued a declaration called the Atlantic Charter, which had at its core the creation of an international organization, and a system of collective security that would deter future aggression.<sup>15</sup> Their idea of a postwar order was finally put before the "Big Four," the United States, United Kingdom, Union of Soviet Socialist Republics (USSR), and China, at a summit in Moscow. The leaders held a series of conferences, including Teheran, Yalta, Potsdam, and Dumbarton Oaks, and

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<sup>14</sup>See footnote 3.

<sup>15</sup>Karen A. Mingst and Margaret P. Karns, *THE UNITED NATIONS IN THE 21ST CENTURY*, Boulder: Westview Press, (2012), p. 22.

finally a general conference on international organization which convened in San Francisco in 1945. There were 51 states participating in the original formation of the United Nations. They negotiated over a period of months, culminating in the signing of the Charter in October 1945. The United States was instrumental in the creation of the United Nations, as Britain insisted on going along with whatever the United States wished for in order to make sure there would not be a repeat of the League experience in the US Senate. Many measures discussed at San Francisco were already agreed upon by the Big Four. Indeed, the conference was intended to give small states a voice in the process but the Charter was a *fait accompli* that was not open to negotiation. The majority of amendments proposed by small states were rejected, except for Chapter VIII of the Charter, which the Latin American states proposed because they feared that the Security Council would have too much power and would give the USSR a voice in regional affairs. The United States was also strongly in favor of this exception and hurriedly negotiated the Chapultepec Treaty with its neighbors, which established a defense alliance among states in the Americas. The Latin American states also formed the Organization of American States (OAS). Chapter VIII allows for the creation of regional arrangements, but they could not engage in military operation without the prior authorization of the Security Council.

Whereas Churchill pushed for the United States to be the anchor of the new organization, one cannot say the same for the USSR. Generally, Stalin was not interested in the creation of the United Nations unless he was given assurances that the new organization would be able to deter future German aggression against his country. However, President Roosevelt wanted the USSR in the new organization, so he was willing to compromise on some issues. Roosevelt agreed to give Russia two additional seats in the General Assembly, Ukraine and Belarus, but rejected Stalin's demand for a veto on all procedural issues in the Security Council. The USSR and China remained very ambivalent about the United Nations and remained somewhat disengaged from the organization until the Korean War. Although the USSR returned to the Security Council during the Korean War, it used its veto power to obstruct efforts in the Security Council to maintain international peace and security. During the period of the Cold War, the USSR became further alienated from the United Nations, as it felt isolated and alone. Communist China was represented by Taiwan, which was an ally of the United States. The US-USSR rivalry would prevent the United Nations from fully implementing its mandate. Up until the decade of the 1990s, the United Nations was incapable of fulfilling its key mandate to maintain international peace and security.<sup>16</sup>

China was generally not interested in the United Nations. In 1945, China was a poor backward state with a huge population. China was not ready to expand its

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<sup>16</sup>Ibid.