Making International Law in the Twentieth Century

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International law developed out of international custom, or the more or less consistent conduct that prevailed among States accounted the most powerful at a particular time. "Customary international law" is still with us in the form of rules that the world of States perceives as "evidence of a general practice accepted as law," still essentially reflecting conduct that is approved or tolerated by the powerful, while inhibiting the development of State conduct not so approved or tolerated. For over the centuries, powerful States have come to understand well the wisdom eventually expressed by Jean-Jacques Rousseau, that

"Le plus fort n'est jamais assez fort pour être toujours le maître, s'il ne transforme sa force en droit et l’obéissance en devoir."

Thus, rules of customary international law which are the result of that conversion of power into right and obedience into duty still govern, or have the potential to govern, the conduct of States in every field, from diplomatic relations to the uses of the oceans and outer space; from the environment to the combat of terrorism; from the use of force to intellectual property law and "cyber law." Transforming power into right and obedience into duty, even today, seems the natural order of things. But is it, indeed, the natural order of things? And if so, is this a part of the natural order that is to remain untouched by evolution?

Clearly, the answer must be negative: conversion of power into right, and obedience into duty is no longer the only, or even the generally favoured means by which international law is created. Article 38 of the Statute of the International Court of Justice directs the attention of the Court first to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States." Some would see the beginning of the development of such participatory and consensual techniques for creating international law in the Congress of Vienna of 1815, when the victors in the wars against Napoleon invited a number of European States to endorse their decisions on several basic legal principles. However, as C.K. Webster observed:

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1 Rousseau, J.-J., *Du Contrat Social*, Chapitre III, “The strongest man is never strong enough to be always master, unless he transforms his power into right, and obedience into duty.”


“... the Congress of Vienna as a congress of all Europe was never constituted. It remained a Congress of the great Powers who for their convenience had summoned the smaller Powers of Europe to meet them. The idea of a constituent assembly, imagined by some ... was found to be impossible. The large number of small States made such an assembly impracticable in any case. But the wishes of the masters of Europe were from the first clear and unbending on this point. They considered themselves as 'Europe', and at the congress they asserted successfully the ascendance of the Great Powers. The smaller States were only to be admitted at such terms as suited those who had great resources and armies at their command.”2

The beginning of the twentieth century saw what we might well come to remember as “The Hague Spring” in the development of participatory “legislative” techniques for the adoption of rules to govern the conduct of States. Some 24 States took part in The Hague Peace Conference of 1899, and some 47 States attended its sequel in 1907. While the great majority was from Europe and North America, a few Latin American States attended in 1907. There were even four States from Asia, but none from Africa. General acceptance of the notion of the juridical equality of States, whether great or small, meant that their preferences were counted at plenipotentiary conferences. Voting took place on a one-State-one-vote basis, but unanimity was required for the adoption of a proposal. There were 27 original Members of the League of Nations, and 13 other States were “invited to join,” and in conferences convened in the aftermath of World War I, participation was somewhat broader than before. The process of codification of international law, begun in private associations like the Institut de Droit International and the International Law Association, came to be sponsored at the inter-State level with the establishment, by the Council of the League of Nations, of the Committee of Experts for the Gradual and Progressive Codification of International Law.

Major developments in the participatory process came at the end of World War II with the creation of the United Nations and the rapid increase in the number of sovereign States with opinions on legal issues seeking the right to express them. The International Law Commission of the United Nations was established, and the practice developed of convening “universal” plenipotentiary conferences on legal issues under the auspices of the United Nations, sometimes styled “law-making,” or, more accurately, “treaty-making” conferences. The first of them, in 1958, was attended by some 86 States. It dealt with the Law of the Sea and adopted as the basis for its deliberations the meticulous preparatory studies carried out by the