Human-Centric International Law: A Model and a Search for Empirical Indicators

John King Gamble*
Charlotte Ku†
Chris Strayer**

This Article is the result of the authors' application of an explicit model of the evolving international legal situation and an empirical test using multilateral treaties. The authors examine all the multilateral treaties signed over the last 350 years, about 6000 treaties, and discuss the "humanization" of international law.

I. INTRODUCTION

In December 2004, the United Nations released the report of the High-Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility."[1] The report recommended that the U.N. security system address a "broader, more comprehensive concept of collective security" than the traditional treatment that comes into play only after troops march across territorial borders.[2] The report noted the conditions that breed unrest—including extreme poverty and infectious diseases[3]—and recommended "that due attention and necessary resources be devoted to achieving the Millennium Development Goals."[4] This broadening of the concept of security was at the heart of the reply to U.N. Secretary-General Kofi Annan's challenge to make the U.N. security system more effective after the bitter divisions created during the

* Distinguished Professor of Political Science and International Law, Pennsylvania State University.
† Executive Director, American Society of International Law.
** Schreyer Scholar, Pennsylvania State University.

1. The Secretary-General, *Follow-up to the Outcome of the Millennium Summit, Note by the Secretary-General*, U.N. Doc. A/59/565 (Dec. 2, 2004).
2. *Id.* at 2, ¶ 5 (emphasis omitted).
3. *See id.* at 11.
4. *Id.* at 2, ¶ 7.

run-up to the U.S.-led war in Iraq.[5] The report noted that we live in a world of new and evolving threats, threats that could not have been anticipated when the United Nations was founded in 1945—threats like nuclear terrorism, and State collapse from the witch's brew of poverty, disease, and civil war.[6] This focus on the human condition as a key to state security is the latest in a series of developments that increasingly have placed the well-being and interests of individuals at the center of contemporary international relations and international law.[7]

But exactly what does "human security" mean? Do norms increasingly address the needs of individuals rather than just those of the state? Have other factors in combination made the notion of human-centric international law (HCIL) plausible? The answer to both questions appears to be yes. There has been an increase in the number of norms that address the protection of individuals and private enterprises.[8] Perhaps less well recognized is the growing reliance on private and noninternational institutions to give effect to international norms.[9] In the 1960s, Marshall McLuhan coined the phrase "the medium is the message."[10] In the twenty-first century, we find that legal processes affect the norms they help to create.[11]

Although it is acknowledged almost universally that the pace of societal change has increased in the twentieth century, international law often seemed immune, continuing its glacial pace of development. However, it is astounding to reflect on the changes in international law that have occurred since the end of World War II. Many of these changes have refocused the attention of international law from state interests to human interests.[12] These changes, the origins of which often are tied to the U.N. Charter[13] and the Universal Declaration of Human Rights (UDHR),[14] can be seen as a shift to a human-centric orientation, and thus distinct from state-centrism, the hallmark of the Westphalian system.[15]

---

5. *See id.* at 1, ¶ 1.
6. *Id.* at 11.
7. *See id.*
8. *See* Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2001 (2003).
9. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 281-82 (1995).
10. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964).
11. *See* Paul F. Diehl, Charlotte Ku & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT'L ORG. 43, 45-53 (2003).
12. *See* HENKIN, *supra* note 9, at 280-82, 284-85.
13. *See generally* U.N. Charter.
14. Universal Declaration of Human Rights, G.A. Res. 217A(111), U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR].
15. *See* HENKIN, *supra* note 9, at 284-85.

It is important, but difficult, to understand the exact nature of this shift. On one hand, international law seems more capable than ever of piercing the veil of sovereignty behind which states have hidden for centuries.[16] But powerful states remain relatively immune; the issue of when intervention in another state is justified is murkier than ever in the post-9/11 world. There is a tendency to bounce between extremes, in Judge Manfred Lachs' words, to be either a Utopian or a denier.[17] Utopians might declare that sovereignty, the dreaded "s word," is dead. Both the word and the concept are roundly criticized. Professor Louis Henkin argued that "sovereignty has also grown a mythology of state grandeur and aggrandizement that misconceives the concept and clouds what is authentic and worthy in it, a mythology that is often empty and sometimes destructive of human values."[18] Deniers might claim that since 9/11, hegemony on the part of the United States goes largely unchecked by international law.[19]

We shall apply an explicit model of the evolving international legal situation and an empirical test using multilateral treaties, specifically the Comprehensive Statistical Database of Multilateral Treaties (CSDMT).[20] Developed at Pennsylvania State University over the last six years, the CSDMT contains basic information about all multilateral treaties signed over the last 350 years, in sum close to 6000 treaties. Complex changes are underway. We hope that the combination of deduction (the model) with an inductive verification (the treaty database) will help to clarify the nature and direction of these changes.

---

16. *See id.* at 282.

17. *See* MANFRED LACHS, THE TEACHER IN INTERNATIONAL LAW 13-28 (1982).

18. Louis Henkin, *The Mythology of Sovereignty*, NEWSLETTER OF THE AM. SOC'Y OF INT'L L., Mar.-May 1993, at 1, 6-7.

19. *See* Detlev Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843-48 (2001); *see also* José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873-74 (2003).

20. The Comprehensive Statistical Database of Multilateral Treaties is a project of the Honors Programs at Pennsylvania State University. It originated in 1998 with a review by John Gamble. John King Gamble, Book Review, 93 AM. J. INT'L L. 565 (1999) (reviewing CHRISTIAN L. WIKTOR, MULTILATERAL TREATY CALENDAR, 1648-1995 (1998)). Since then, Wiktor and other sources have been used to develop a comprehensive listing of all multilateral treaties from 1648 to 1995. The emphasis of CSDMT is breadth and statistical data. Initially, this included four variables: signature date, laterality, three topic categories, and relationship to intergovernmental organizations (IGOs). Currently, the project is being expanded to include length, number of articles, selected parties, dispute settlement provisions, termination clauses, reservations clauses, and official languages.

II. HCIL IN TREATY PERSPECTIVE

International law in the twentieth century often was characterized by movement towards human-centrism, where individuals moved to center stage, a place previously occupied solely by states. There is a certain irony in the fact that states themselves facilitated this movement, as demonstrated initially by the international human rights movement's ability to make state borders more porous.[21] It was here that the once formidable concept of state sovereignty began to erode. For example, article 8 of the Convention on the Prevention and Punishment of the Crime of Genocide provides that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide."[22]

International law also has developed through customary law, albeit with a comparatively longer "percolation period," and in the face of resistance from some states. As Henkin explained:

> Custom is now made by new forms of practice .... Without unanimity and without agreed theoretical justification, international law has developed the concept of *jus cogens* and has given it some content, for example, the "higher law" prohibiting the use of force, genocide, apartheid. Now customary law ... is also made purposefully and quickly. The making of customary law now reflects pressures for acquiescence through the uses of consensus (especially in the United Nations General Assembly).[23]

This change appears to be permanently influencing the future course of international relations with multiple layers of authority—layers at the suprastate, state, and substate levels—affecting both politics and law. Both nongovernmental organizations (NGOs) and IGOs mobilize the transformational aspect of world opinion in support of human rights. In Henkin's words, "non-governmental organizations ... seek to mobilize outrage and shame to terminate and deter gross violations."[24]

HCIL is most closely associated with human rights. Where powerful princes and states would have undertaken the protection of particular populations in the seventeenth, eighteenth, and nineteenth

---

21. *See* HENKIN, *supra* note 9, at 280-81, *reprinted in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 551, 552 (Charlotte Ku, Paul F. Diehl eds., 1998).

22. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. TREATY DOC. NO. 80-1 (1989), 78 U.N.T.S. 277, No. 1021 (entered into force Jan. 12, 1951, and ratified by the United States Feb. 23, 1989) [hereinafter Convention on Genocide].

23. HENKIN, *supra* note 9, at 281.

24. *Id.* at 282.

centuries, the need to protect individuals, regardless of whether there was a state patron to assure such protection, has been developing at least since the end of World War II.[25] Horrified by the genocide that took place in Nazi-controlled Europe and Japanese-occupied Asia, the victorious powers were determined that such atrocities would never recur.[26] The Convention on the Prevention and Punishment of the Crime of Genocide and the UDHR were early manifestations of this concern; because of their focus on populations, as distinct from states, these conventions laid the groundwork for modern HCIL.[27]

HCIL also includes economic relations. Since the great European state trading companies, such as the Dutch and British East India Companies, extolled the virtues of free enterprise, states have promoted the private interests of their entrepreneurs in international competition. The inability of the post-World War I trading environment to support productive enterprise, due to high national tariff barriers and ruinous exchange rates, inspired planning in the post-World War II era to create conditions for a stable trading environment without stifling free enterprise. The International Monetary Fund (IMF), the International Trade Organization, and the World Bank were institutions that emerged from these plans, adopted at Bretton Woods, New Hampshire, in 1944.[28] The International Trade Organization foundered, but gave way to the General Agreement on Tariffs and Trade that developed into the World Trade Organization (WTO) in 1995.[29]

The issues faced by these financial institutions and the methods they adopted to manage them created IGOs with roles for private actors.[30] This can be found in the dispute settlement mechanisms developed by these institutions: the WTO Appellate Body and the International Centre for the Settlement of Investment Disputes.[31] As Ronald Brand observed:

> The twentieth century has seen new recognition of the direct application of international law to relationships between individuals and states. The law of economic relations is one area in which international law (traditionally considered only applicable between and among "sovereign"

---

25. *See* The Secretary-General, *supra* note 1, at 11.

26. *See id.*

27. *See* Convention on Genocide, *supra* note 22; UDHR, *supra* note 14.

28. *See* Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 25 U. PA. J. INT'L ECON. L. 669, 677-78 (2004).

29. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 15 n.47 (2005).

30. *See* Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 279, 289 (2002).

31. *Id.* at 289-90.

> states) has grown to encompass rules that provide rights for individuals in their relationships with states.[32]

These bodies not only provided a means to address state treatment of private party interests, but also have allowed private parties to represent their own interests directly in negotiations.[33]

These developments are important in and of themselves but also have had a multiplier effect, including the emergence of the norms and institutional structures of human rights, and the intensification of transborder activities, described generally as globalization. The power of communications technology has given individuals and NGOs unprecedented access to international activities.[34]

The increasing importance of HCIL is related to the development of IGOs. Almost ninety years ago, when United States President Woodrow Wilson outlined goals upon entering World War I, he proposed a concert of peace in his Fourteen Points speech in January 1918.[35] Point XIV provided for "[a] general association of nations . . . formed under specific covenants for the purposes of affording mutual guarantees of political independence and territorial integrity to great and small states alike."[36] At the same time, Point V introduced the notion that the "interests of the populations concerned must have equal weight with the equitable claims of the government."[37] However, true to the times, these interests remained the prerogative of states to be advanced by and through governments.

The U.N. Charter system also recognized the importance of individual well-being to the security system it was establishing:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;

---

32. *Id.* at 290.

33. *Id. But see* Donald M. McRae, *Crafting Mechanisms for Settling International Trade Disputes: WTO and NAFTA as Models*, *in* TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: FROM THEORY INTO PRACTICE 331 (Thomas Schoenbaum et al. eds., 1998).

34. *See generally* John King Gamble & Charlotte Ku, *International Law—New Actors and New Technologies: Center Stage for NGOs*, 31 LAW & POL'Y IN INT'L BUS. 221, 221-62 (2000).

35. Woodrow Wilson, U.S. President, Address to Congress Stating the War Aims and Peace Terms of the United States (Jan. 8, 1918), in 1 THE MESSAGES AND PAPERS OF WOODROW WILSON 464 (Albert Shaw ed., 1924) (1917).

36. *Id.* at 470.

37. *Id.* at 468.

> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[38]

This structure provided a clear separation between the organs charged with security (the Security Council), and those charged with the stability and well-being of individuals (the Economic and Social Council, the Trusteeship Council, and certain other specialized agencies). Under the provisions of article 10, the U.N. General Assembly "may discuss any questions or any matters within the scope of the present Charter" except for issues dealt with by the Security Council.[39] The General Assembly must also refrain from acting on matters before the Security Council,[40] unless the Security Council requests its action[41] or the procedures of the Uniting for Peace Resolution are activated once the Security Council has become deadlocked because of the threat of a veto by one of its Permanent Members.[42] Although the importance of the well-being of individuals was recognized in the U.N. structure, human welfare was generally considered to be separate from, and generally subordinate to, state security.

The U.N. security system reflected a certain hierarchy, starting with the security of member states.[43] States, in turn, would protect the safety and well-being of the people within their territory. Collectively, these actions would provide global stability.[44] It was a state-centered vision of world order. The rivalry of the Cold War, however, delayed the development of human-centric aspects of this arrangement.

The end of the Cold War marked another turning point in the understanding of security, with conflicts erupting over intrastate issues and in response to deliberate governmental policies of extermination and displacement of populations. These conscience-searing events forced a reexamination of the obligation of noninterference in the domestic affairs

---

38. U.N. Charter, art. 55.
39. *Id.* art. 10.
40. *Id.*
41. *Id.* art. 12, para. 1.
42. G.A. Res. 377, ¶ 1, U.N. GAOR, 5th Sess., Sup. No. 20, U.N. Doc. A/1775 (Sept. 19, 1950).
43. *See* Reem Bahdi, *Iraq, Sanctions and Security: A Critique*, 9 DUKE J. GENDER L. & POL'Y 237, 242-43 (2002).
44. *See* U.N. Charter, art. 1.

of states and the formulation of standards to address instances where international action is essential in light of unfolding atrocities.[45]

Even before the end of the Cold War, the United Nations recognized the need for a broad and multidimensional strategy for conflict prevention. In 1985, U.N. Secretary-General Javier Pérez de Cuéllar gave a series of speeches that included descriptions of this strategy in the areas of "peace and security, development, human rights and humanitarian affairs."[46] This move toward including human rights and humanitarian concerns in the security agenda was developed further after the Cold War following the historic 1992 Security Council summit where then-U.N. Secretary-General Boutros Boutros-Ghali was asked to prepare a report on the prevention of conflicts. His 1992 *Agenda for Peace* explicitly made the connection between human rights and conflict prevention:

> The sources of conflict and war are pervasive and deep. To reach them will require our utmost effort to enhance respect for human rights and fundamental freedoms, to promote sustainable economic and social development for wider prosperity, to alleviate distress and to curtail the existence and use of massively destructive weapons.[47]

On September 12, 2001, the United Nations Security Council took another step to expand the scope of security. In response to the terrorist acts that occurred in New York City and Washington, D.C., the Security Council adopted Resolution 1368, which recognizes the inherent right of individual and collective self-defense.[48] By doing so, the Council, for the first time in history, expanded its understanding of security and self-defense to include acts committed against member states and their citizens by nonstate actors.[49] The Security Council moved again to expand its definition of security relevant issues when it passed Resolution 1373 on September 28, 2001.[50] Resolution 1373 called on member states, under Chapter VII of the U.N. Charter, to take specific measures to "refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized

---

45. The President of the Security Council, *Statements by the President of the Security Council on Behalf of the Council*, 115, 117, 120, S/235000 (Jan. 31, 1992).

46. BERTRAND G. RAMCHARAN, THE SECURITY COUNCIL AND THE PROTECTION OF HUMAN RIGHTS 63 (2002).

47. The Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* ¶ 5, U.N. Doc. A/47/277-S/24111 (June 17, 1992), *quoted in* RAMCHARAN, *supra* note 46, at 65.

48. *See* S.C. Res. 1368, U.N. Doc. S/Res/1368 (Sept. 12, 2001).

49. *See id.*

50. S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001).

activities within its territory directed towards the commission of such acts."[51]

Recalling Hendrik Spruyt's assertion that changes to the international system are the product of historic processes and patterns of conduct,[52] a review of Security Council practice shows that these moves toward an expanded concept of security to include human rights had been developing since the Council sanctioned Southern Rhodesia and South Africa in the 1960s and 1970s for violating the human rights of their citizens through the practice of apartheid.[53]

International law has expanded into previously uncharted areas of family law, criminal law, the enforcement of contracts, and court judgments. For example, the European Convention on the International Validity of Criminal Judgments creates "portability" by allowing the "sentencing State [to] request another Contracting State to enforce [a] sanction."[54] Another example is the European Convention on the Legal Status of Migrant Workers, which demonstrates family and process enforcement traveling abroad by providing that a worker's responsibility for family and child support payments may be pursued between states.[55] The additional impacts of IGOs, such as the International Labour Organization (ILO), that empower workers vis-à-vis states and the wider acceptance of a major role for NGOs—as seen in the Ottawa Landmines Convention[56]—have transformed international law in ways which would have been inconceivable forty or fifty years ago.

Beyond a huge increase in transborder activity, the structural conditions for the further development of HCIL have been emerging. This is evident in international law's reliance on a complex mix of informal, private, and national or subnational entities. Taken individually, these expanding modalities would have had a profound influence on international law. Taken together with the structural reliance on noninternational institutions and processes to provide legislative and executive functions on an ongoing basis makes the move towards HCIL all the more significant.

---

51. *Id.*

52. HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS 18-19 (1994).

53. *See* S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966); S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

54. European Convention on the International Validity of Criminal Judgments, Europ. T.S. No. 70, art. 5, *opened for signature* May 28, 1970 (entered into force July 26, 1974).

55. European Convention on the Legal Status of Migrant Workers, Europ. T.S. No. 93, art. 11, Nov. 24, 1977 (entered into force May 1, 1983).

56. Gamble & Ku, *supra* note 34, at 249-53.

Before moving on to the next Part, it is necessary to provide background about treaty data from the CSDMT in order to interpret Figures 1, 2, and 3 *infra*. Depending on the rigor of one's definition, about 6500 multilateral treaties of enormous variety in subject matter and importance were signed between 1648 and 1995. For the purposes of this Article, we examine those treaties in which the principal focus appears to be human beings. Many treaties pay some attention to the individual but do not focus principally on them—for example, the U.N. Charter. We identified 632 human-centric treaties that we subdivided into four categories: classical, limits on war, workers' rights, and modern human rights law:

"Classical": The classical group represents the earliest manifestation of HCIL in treaties. It consists of several areas, such as piracy, the slave trade, trafficking in persons, and forced or compulsory labor. While the category is "classical" in the sense of early initial use, a few of these treaties were signed as late as the mid-twentieth century.[57]

Limits on War: The "limits on war" group includes those treaties addressing rights and responsibilities accepted during war. It includes instruments dealing with, for example, civilians, prisoners, the sick and wounded, and refugees. Because the use of weapons of mass destruction often results in the destruction of civilian population centers, these treaties are also included.[58]

Workers' Rights: The "workers' rights" group of treaties addresses the fundamental rights of workers. Many of these instruments have been drafted under the auspices of the ILO. Most of the rights guaranteed under these treaties are based on membership in an occupational group that may be defined, in part, by gender or age. Some of these instruments are quite narrowly focused.[59]

Modern Human Rights Law: The "modern human rights law" group of treaties, epitomized by the UDHR,[60] places emphasis on the rights of the individual,[61] but also frequently considers group identity.[62]

---

57. *See, e.g.*, Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 243.

58. *See, e.g.*, Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

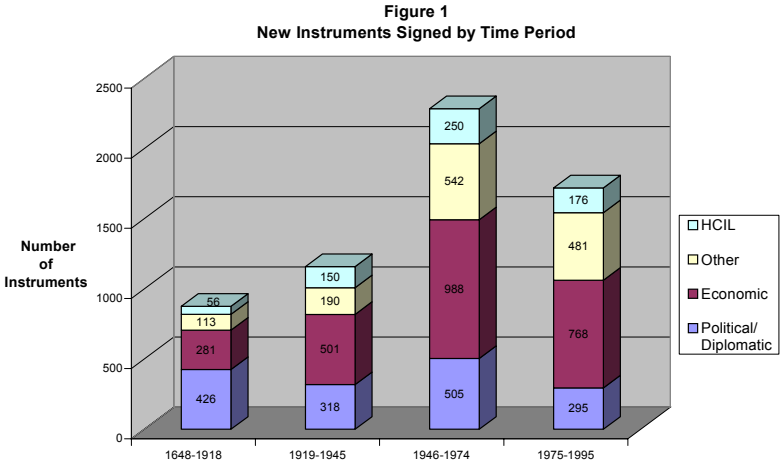
59. *See, e.g.*, Marking of Weight (Packages Transported by Vessels) Convention, June 21, 1929, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?co27.

60. UDHR, *supra* note 14.

61. *See, e.g.*, European Convention on the Adoption of Children, Apr. 24, 1967, 634 U.N.T.S. 256.

62. *See, e.g.*, Convention on Genocide, *supra* note 22.

This category became very important after World War II, although the earliest instrument was signed in 1902.[63]



III. A HUMAN-CENTRIC ANALYSIS OF THE CSDMT

Figures 1, 2, and 3 analyze HCIL treaties according to their respective time periods and compare them with other types of treaties.[64] To compare HCIL treaties with other treaties, we have aggregated the other treaties into three broad categories: "economic," "political/ diplomatic," and "other."[65]

Figure 1 shows the actual number of newly signed HCIL instruments for each time period. The number of HCIL treaties increases through 1974 and then declines slightly.[66] HCIL treaties follow the same general trend as other treaties. One of the clearest findings is that the first two decades after World War II saw a flurry of treaty activity that slowed down somewhat after about 1970.[67] This probably reflects the

63. *See generally* The Convention Relative to the Rights of Aliens, Jan. 29, 1902, 32 O.A.S.T.S. 58.

64. We selected time periods to correspond with watershed international events but limited ourselves to four periods so we would have enough data—treaties—from which to draw conclusions.

65. We acknowledge that there is a limitation to this data. Our approach presents new treaties signed during the designated time periods. While our approach is valid, it does not account for the fact that a treaty may, for example, have been signed in 1945 and continue to have a major impact on the international legal system for decades thereafter.

66. *See supra* Fig. 1.

67. *See id.*

creation of many new permanent institutions, most of which continue to operate today.

Figure 2
Emergence of HCIL: New Instruments by Time Period

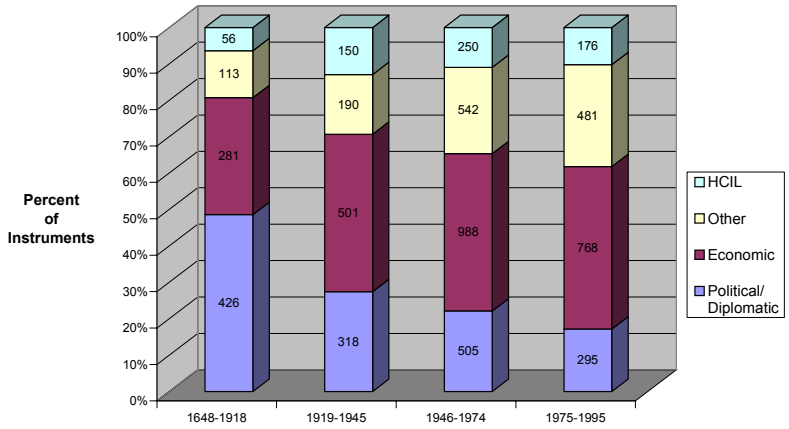


Figure 2 provides the same information as Figure 1, but it uses percentage terms to facilitate comparisons across time periods. Two things stand out. First, Figure 2 depicts a larger number of economic treaties after 1918 and a steady decline in political/diplomatic instruments.[68] The percentage of total global, multilateral treaties categorized as HCIL treaties remains relatively steady:

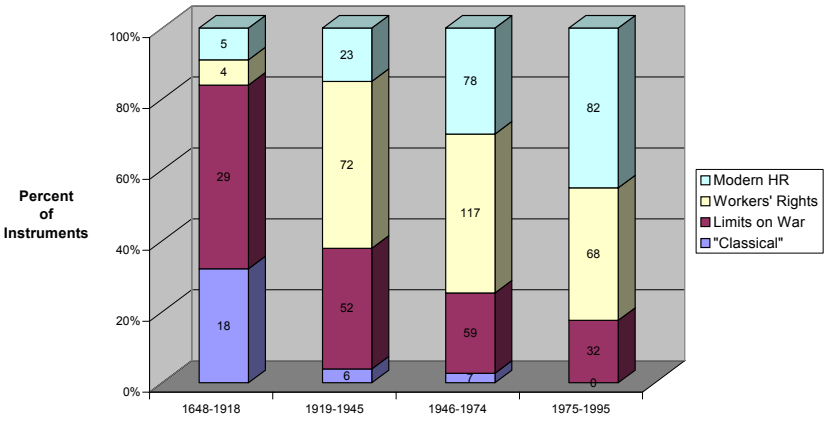
1648-1918: 5%
1919-1945: 10%
1946-1974: 9%
1975-1995: 9%[69]

Second, there has *not* been an explosion of HCIL treaties, either in relative or absolute terms; rather, there has been a significant expansion in the range of activities governed by multilateral treaties, with the greatest increase occurring in the economic sphere.[70] The metaphor of a rising tide seems appropriate.

68. *See supra* Fig. 2.
69. *See id.*
70. *See id.*

Figure 3 examines the four groups within HCIL and presents the results both as percentages for time periods and actual numbers of treaties (the four numbers within each column). One would expect clear trends, because the four groupings have a strong temporal aspect to them. Indeed, the number of "classical" instruments has declined to zero.[71] The law in areas such as slavery and piracy is settled and, therefore, needs no further codification. Modern human rights law shows a consistent increase throughout the centuries, rising from ten percent of HCIL treaties in the first period to 51% for 1975-1995.[72] Finally, the portion of HCIL multilateral treaties dealing with workers' rights and limits on war have been quite steady since 1919.[73]

Figure 3
New Instruments of HCIL by Time Period



IV. HCIL IN PERSPECTIVE: THE ORSON WELLES PARALLEL

It is universally acknowledged that the twentieth century brought sweeping changes to the international system. The coverage of international law expanded to embrace both new subjects and new forms of interaction.[74] Issues are no longer exclusively local or global; now often they are both.[75]

---

71. *See infra* Fig. 3.
72. *Id.*
73. *Id.*
74. *See* David Held, *From Executive to Cosmopolitan Multilateralism*, *in* TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 160, 162 (David Held & Mathias Koenig-Archibugi eds., 2003).
75. *See id.*

The "players" in international law have expanded, qualitatively most dramatically in the case of IGOs and NGOs. Previously, conferences were convened as needed for a particular treaty and generally disbanded once the work was complete.[76] In the twentieth century, however, bodies such as the International Law Commission have created a permanent presence and produce treaty drafts that sometimes are accepted as evidence of international custom.[77] Furthermore, the ILO, as both an international and nongovernmental forum, has created almost two hundred treaties that are binding on member states.[78] However, the dramatic growth of organizational actors must not be allowed to obscure the fact that the number of states has increased by a factor of four since 1945. With the increased volume of cross-border activity, wholly private actors also have come into their own on the international stage.

Pioneering work drawing attention to these shifting boundaries can be seen in feminist scholarship. For example, Sab Bahar has written on how women's movements are bringing "the state's responsibility for private human rights violations to international attention."[79] Hilary Charlesworth has written on the relative protections afforded by international law,[80] and Miriam Ching Yoon Louie has written on the Korean women's movement efforts to force Japan to admit its World War II atrocities.[81] This scholarship has raised awareness of international behavior, particularly the treatment of individuals.[82] Today, states ignore human rights standards at considerable cost to their international reputation. Although those rights are still inconsistently applied, for example, in Rwanda, states may risk war if the transgressions are egregious enough.[83]

International economic and trade law is an area of international law where the relationship between public and private spheres is in a state of flux.[84] The public/private relationships, which needed a basis for

---

76. Jose Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 218 (2002).

77. *Id.* at 221.

78. For a complete listing, see the ILO's Database of International Labour Standards, http://www.ilo.org/ilolex/english/convdisp1.htm.

79. Saba Bahar, *Human Rights Are Women's Right: Amnesty International and the Family*, *reprinted in* GLOBAL FEMINISMS SINCE 1945, at 265, 268 (Bonnie G. Smith ed., 2000).

80. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 379-94 (1999).

81. Miriam Ching Yoon Louie, Minyung *Feminism: Korean Women's Movement for Gender and Class Liberation*, *in* GLOBAL FEMINISMS SINCE 1945, *supra* note 79, at 119, 132.

82. *See supra* notes 32-34 and accompanying text.

83. *See* Charlesworth, *supra* note 80, at 385-88.

84. *See* Brand, *supra* note 30, at 290-91.

operation, were handled by dispute settlement, whereas investment and trade agreements were made by states. However, disputes about the operation of these agreements often occurred between private corporations and the public authorities in states where the corporations' trade or investment was occurring.[85] Innovations, such as the International Centre for the Settlement of Investment Disputes, were created so that private parties could pursue a dispute directly against a state to resolve issues arising from investments.[86]

There has been vertical development where international and national systems of governance are converging to perform legislative and administrative functions for international law.[87] This occurs because:

> —the capacity of international institutions is limited;
> —more developed institutional, political, and legal processes are available at the national level; and
> —working within a less institutionalized international framework can provide the opportunity for cooperation and coordination without developing a hierarchy that may make such cooperation more politically costly for states.

In a 2001 lecture titled *Global Governance and the Changing Face of International Law*, Charlotte Ku observed that an enduring theme of international relations is expansion and diffusion.[88] She continued, noting that "[h]ow well international law has expanded its framework to address this diffusion is a key test of international law's relevance to global governance questions in the future."[89] Since the mid-twentieth century, the international system has seen normative growth without a proportionate increase in the capacity of international institutions and frameworks to implement these norms.[90] The result has been a potpourri approach to governance where ad hoc partnerships perform functions that the formal institutions seem unable to carry out.[91]

States themselves have promoted change within this framework. An early example can be seen in the First Hague Peace Conference of

---

85. *See id.* at 289-90.
86. *Id.* at 290.
87. *Id.* at 293.
88. Charlotte Ku, Executive Dir., Am. Soc'y of Int'l Law, Address at the Annual Meeting of the Academic Council on the United Nations System: Global Governance and the Changing Face of International Law (June 2001), *in* 2 ACUNS REPORTS & PAPERS, 7 (2001), *available at* http://www.acuns.org/_PDF/publications/2001.Holmes/GG_Ku.pdf.
89. *Id.*
89. *Id.*
90. *See* Diehl, Ku & Zamora, *supra* note 11, at 52.
91. *See id.*

1899, held at the request of Czar Nicholas II of Russia.[92] The conference was effective not only in laying a foundation for later talks, but also in establishing The Hague as a preferred site for international meetings on that topic.[93] A more recent example can be seen in decolonization: the number of participants at The Hague Conferences increased from twenty-six in 1899 to forty-four in its follow-up conference eight years later.[94] This number quadrupled over the next century to 191 members of the United Nations, a forum for international conferences.[95] These numbers are even more remarkable, looking at them in terms of people:

> Harold Jacobson observed that, in 1945, "almost a quarter of the world's population lived in dependent territories. By 1970, less than 1 percent of the world's population inhabited territories that had not attained self-rule, and by 1983 the number had been reduced to just over two-tenths of 1 percent."[96]

Although states continue to be the principal law-making authorities, more and more they are working through frameworks created by international institutions.[97] The need to rely on modalities such as the U.N. General Assembly means that debates that are sustained in such organs themselves may ultimately become a part of the law-making process.[98]

Substantively, contemporary issues that require a universal approach may be more promptly addressed in such general fora as the individual organs of the United Nations or at worldwide, U.N.-sponsored conferences.[99] As Jonathan Charney has concluded, "[t]he augmented role of multilateral forums in devising, launching, refining and promoting general international law has provided the international community with a more formal lawmaking process that is used often."[100]

Another form of institutional influence is visible in the function of the United Nations Secretariat in advocating successfully for the

---

92. Oscar Schachter, Luncheon Address at the Proceedings of the Second Joint Conference: The 100th Anniversary of the 1899 Hague Peace Conference (July 24, 1993), *in* CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE 453, 453 (Rene Lefeber ed., 1994).

93. *Id.* at 453.

94. Ku, *supra* note 88, at 20.

95. *Id.*

96. *Id.* (quoting HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 349 (2d ed. 1984)).

97. *Id.* at 21.

98. *Id.*

99. *Id.*

100. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 551 (1993).

International Criminal Court.[101] This shows that the intergovernmental and multilateral treaty-making process sponsored by the United Nations provides opportunities for skilled staff performing the intricate coordination and drafting of such treaties to influence the preparation of these agreements.[102]

Even twenty years ago, the kind of "people power" generated by Solidarity, Helsinki Watch, Charter 77, and other NGOs eventually created pressures from within the Warsaw Pact countries themselves to acknowledge human rights, which was a factor in the end of the Cold War.[103]

Nonetheless, as Charlotte Ku noted in her 2001 lecture:

> Yet, while it seems clear that the public sector no longer can function effectively without the cooperation and participation of the private sector and the involvement of individual citizens, it remains true that the private sector cannot solve all problems without the infrastructure and coordination that states and international institutions provide.[104]

It was, in fact, an intergovernmental agreement, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe, that cultivated the "human dimension" through its system of follow-up conferences.[105] Ku also noted that "the follow-up conferences also provided opportunities for NGOs seeking to liberalize the political institutions of the Warsaw Pact countries to gain political legitimacy and for their leaders to gain confidence in political activism and in the support of the international media for their efforts."[106] Tellingly, this systemic process fostered a "quiet and largely bloodless revolution."[107]

An analysis of the CDSMT data confirms the hypothesis that the number of treaties addressing human-centric concerns has increased.[108] But concerns about the effectiveness of these treaties beg the question whether the volume of formal legal obligations is enough to suggest that international law is moving towards a more human-centric focus. Figure

---

101. Ku, *supra* note 88, at 21.

102. *See id.* (citing Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE 12-15 (1999)).

103. *Id.* at 33.

104. *Id.* at 33-34.

105. *See* Thomas Buergenthal, *CSCE Human Dimension: The Birth of a System*, *in* 1:2 COLLECTED COURSE OF THE ACADEMY OF EUROPEAN LAW 163, 171, 180 (1992).

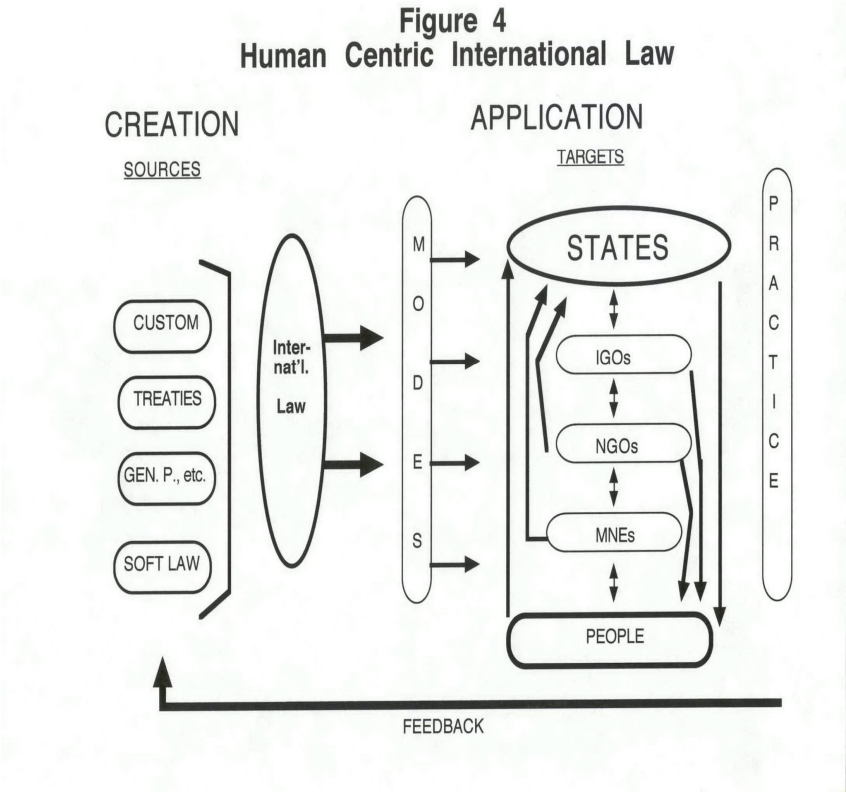
106. Ku, *supra* note 88, at 34 (citing Buergenthal, *supra* note 105, at 172).

107. *Id.*

108. *See supra* Fig. 1.

4 *infra* attempts to illustrate some of international law's dynamics as a recognized obligation (*opinio juris*) is transformed into practice.[109]

Figure 4
Human Centric International Law



Several implementation modes give life to the sources of international law. These modes can be seen as interactions among political actors, many of which are also meant to be the objects of an international legal obligation. The list of important actors includes two public actors—states and IGOs—and three private actors—NGOs, multinational entities (MNEs), and individuals.[110] The political interactions of these several important actors give effect to international law. The two dominant actors appear to be states and individuals, because they are most broadly and consistently influenced—not only by their own political actions, but by those of the other identified actors. For the following reasons, we hypothesize that the rate and importance of

109. *See infra* Fig. 4.
110. *See id.*

these mediated contacts between states and individuals will continue to broaden and deepen:

1. because of the frequency of cross border contacts and increasing number of subjects now covered by international law;
2. because of the opportunities for broad public participation in intergovernmental activity made possible by technology; and
3. because of the growing need for governments to engage private intermediaries, not only to provide information, but also to connect "the abstract deliberations of governments and the practical needs and wishes of their citizens."[111]

Ultimately, international law will become more human-centric through practice and specific normative development.

Figure 4 paints a general picture of the context within which all international law develops. The vast majority of international law still must depend on action by states, even after the law is created.[112] In fact, the role of states in the model is so pervasive it cannot be represented easily. This is reminiscent of the famous movie, *Citizen Kane*, which Orson Welles wrote and directed, and in which he starred.[113] States are comparably ubiquitous in Figure 4 as they are absolutely essential to the two principal sources of international law—custom and treaties—and they remain the principal force in virtually all elements of the model.[114]

Figure 4 asserts the importance, but not the preeminence of, HCIL. There remain relatively few areas where international law operates directly on the individual. Far more common is the situation where international law establishes rights for the individual, even though states must take action for these rights to be meaningful. The expectations of the international community for application, enforcement, and implementation of international legal standards vary dramatically for different states. One cannot expect the Kingdom of Denmark and the Democratic People's Republic of Korea to behave in the same way. Figure 4 looks busy and complicated because of the large number of routes by which international law can reach the individual and because the vehicles for making the journey are unprecedented.[115] Potholes, detours, dead-ends, and confusing road signs exist. But, to a greater extent than at any other time in history, more international legal norms

---

111. Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137, 137 (1990).

112. *See supra* Fig. 4.

113. CITIZEN KANE (Mercury Productions Inc. & RKO Radio Pictures (1941).

114. *See supra* Fig. 4.

115. *See supra* Fig. 4.

will complete the journey relatively intact and the rights of individual people will be more clearly defined and better protected.