INTERNATIONAL LAW
NORMS, ACTORS, PROCESS

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INTERNATIONAL LAW
NORMS, ACTORS, PROCESS

A Problem-Oriented Approach

Fifth Edition

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To

Theresa, Elizabeth, and Joel

Brian

Nancy, Benjamin, and Isabel

and

Brianna and Lauren

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Preface

This fifth edition of our book welcomes a new co-author, Monica Hakimi of the University of Michigan Law School. The vision for this volume remains the same: to provide a general introduction to the range and reach—and the possibilities and limits—of contemporary international law. To do so, the book is built around a series of current problems that illustrate international law in action. These materials are intended to convey an understanding of the profound transformations that mark international law in the current era, and of recent theories and developments that challenge some of the discipline's most basic assumptions. Today's students and tomorrow's international lawyers will benefit from a casebook prepared with these fundamental shifts in the nature of the subject in mind.

The book is also designed to convey to students a keen sense of the process for the making, interpretation, and application of international legal norms, rather than focusing on law as a set of detailed rules or doctrines. It is our experience as teachers that the best way to get students interested in these processes and to show their relevance to modern society is to rely as much as possible on real situations where the law has made—or not made—a difference. Using real-world problems permits students to consider the formation and application of international law in the specific contexts in which such problems arise, and to appreciate the complexity and interrelated character of international legal issues as they appear to lawyers in practice. Moreover, we believe that only through an examination of international law's principal actors, methods of lawmaking, and key subjects can a student fully understand what it means to have law in a context that lacks a single legislature, executive, or judiciary.

The problems are chosen, in part, for their importance or intrinsic interest and, in part, to highlight many of the profound transformations that characterize international law in the twenty-first century. Thus, throughout the text we focus on creative new forms of lawmaking, including "soft" law, as well as treaty regimes; the increased importance of non-state actors, such as corporations, sub-state units, and non-governmental organizations; new compliance strategies; the growth of critical subject areas, notably international criminal law and international economic law; and the erosion of traditional divisions among these subjects. Given our focus on current international legal controversies, we omit a number of classic doctrinal areas that receive extended treatment in other texts but that do not raise critical process-related issues as dramatically as those we have chosen.

We recognize that a limited number of problems cannot possibly present the entire spectrum of international law. Indeed, we have consciously avoided the temptation to create a treatise or to present encyclopedic treatments of the limited range of issues covered. Instead, our overriding goal has been to create a book that serves as an effective teaching tool. To this end, each chapter begins with a short introduction to the particular field of international law at issue, and each problem begins with an overview and a set of key goals designed to orient the student to the materials that follow. Problems are followed by relevant primary and secondary source materials. These materials are both interdisciplinary and multi-perspectival and are intended to enrich the student's understanding of relevant issues. Notes and questions are kept to a minimum.

This book is organized into six parts, each consisting of two or more chapters for a total of fourteen chapters. Part I introduces students to international law and lawmaking. Chapter 1 uses one problem to illustrate basic concepts in and the changing nature of contemporary international law. Chapter 2 uses a series of problems to serve as vehicles for discussing treaties, customary international law, and soft law. Part II focuses on the principal participants (other than individuals) in the international legal system. Chapter 3 addresses the processes of state formation and dissolution, self-determination, state responsibility, and the legal status, powers, and responsibility of international organizations. In recognition of the prominence that non-state actors have assumed in contemporary international law, Chapter 4 includes three problems that explore the variety and roles that these entities play.

Part III explores the interactions between international and domestic law. Chapter 5 focuses on the impact of international law in domestic systems, while Chapter 6 explores the ways that states assert their authority abroad. Part IV focuses on the use of international law to protect human dignity. Chapter 7 covers human rights, including both civil and political rights, and economic, social, and cultural rights. We also include two chapters on rapidly evolving areas: Chapter 8 examines the legal regulation of the conduct of war, and Chapter 9 covers issues of individual accountability for human rights abuses. Part V focuses on issues generated by the interdependence of states and the need for collective action to protect international common resources and to facilitate international economic activity. Chapter 10 covers the law of the sea; Chapter 11 examines international environmental law; and Chapter 12 explores international economic law.

We take seriously the challenges of those who question the relevance, legitimacy, and justice of international law. Most casebooks bury these issues near the end of an introductory chapter, after which the issues disappear. As a conceptual matter, we think that starting a book with these issues often appears to be unduly defensive; as a practical matter, we think that discussing these issues before students have studied international law is unlikely to be productive. We also think the issues are too important to be treated in this way. Thus, we raise questions about the relevance and efficacy of international law throughout the text. We devote Part VI, the final part of the book, to an examination of the most important challenges to international law. Chapter 13 examines the use of force in international affairs. In Chapter 14, the book's final chapter, we focus more explicitly on the legitimacy, relevance, and justice of international law, through an examination of several contemporary issues, including the role of international courts, the practice of targeted killings, and access to antiretroviral drugs to respond to the AIDS pandemic.

The book is designed to stimulate interest in, and thinking about, international law. It is an invitation to share our commitment to exploration of the uses and limits of international law—where it succeeds, where it fails, and how it can be improved. We welcome your comments and suggestions.

Jeffrey L. Dunoff
Monica Hakimi
Steven R. Ratner
David Wippman

December 2019

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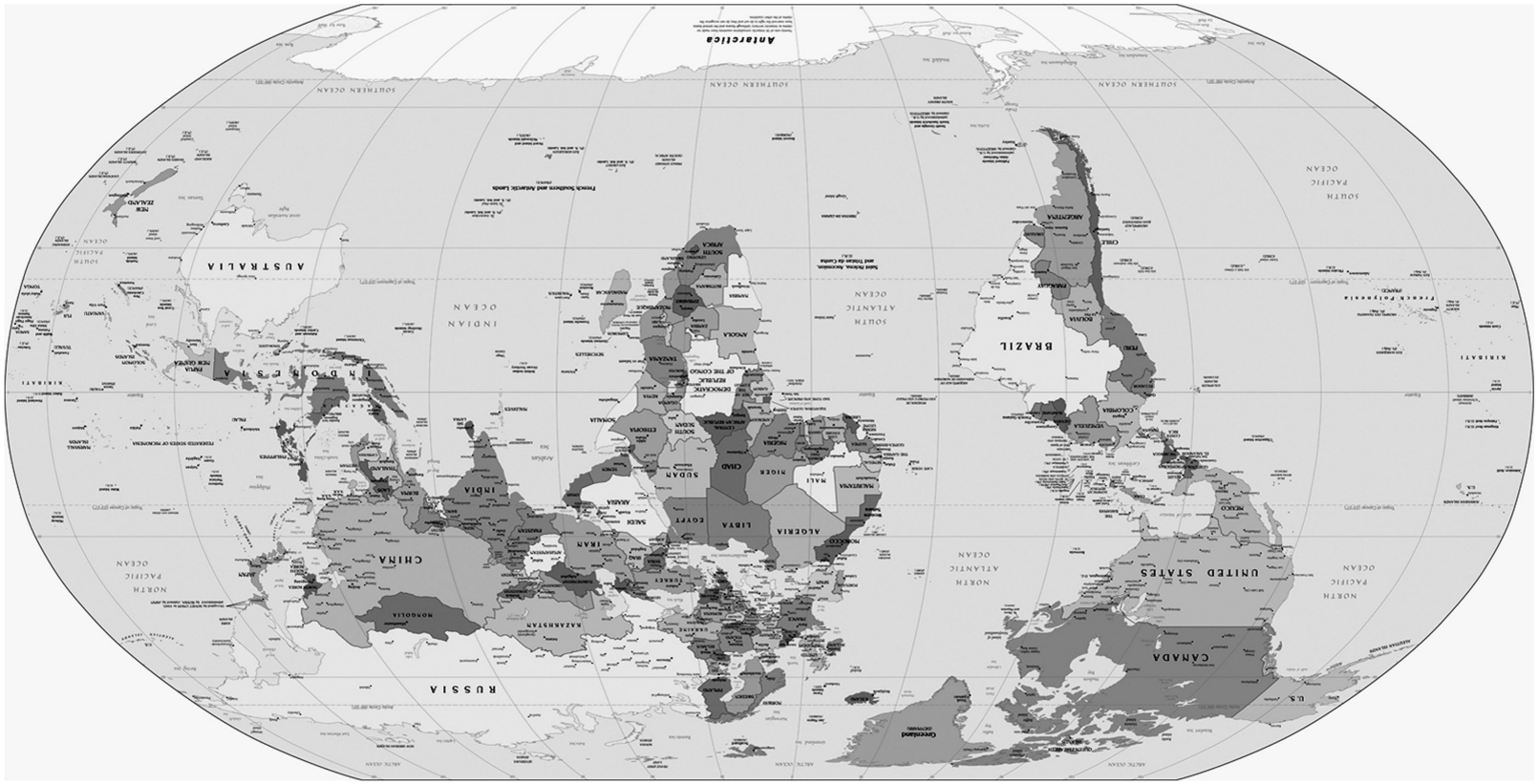
Authors' Note

In order to provide a sense of the appearance of original international legal documents, we have attempted as much as possible to retain the formatting of documents as they appear in the original, authoritative source. In some cases, this results in different typefaces in the text. For convenience, additions to excerpted material are indicated by brackets. Deletions are indicated by ellipses, unless the deletions occur at the beginning of court or tribunal decisions or dissents. Citations and footnotes are generally omitted from excerpted materials without using an ellipsis. Footnotes that appear in excerpted materials retain the numbering of the originals; footnotes denoted by an asterisk are the authors'.



SOURCE: CIA World Factbook
Political Map of the World 2015

PART I

Introduction to International Law and Lawmaking

International law, in one form or another, dates back thousands of years, and reflects the felt need of most independent political communities for accepted norms and processes to regulate their interactions. Part I of this casebook is designed to introduce you to the issues, processes, actors, and norms that constitute modern international law, and the ways in which international legal norms are generated, interpreted, and applied. The Problems in Part I illustrate in microcosm the kinds of issues that confront international decision makers and the ways in which international legal norms and processes may be used to analyze and resolve such issues.

Chapter 1 provides an overview of the evolution and historical development of international law and institutions. It is organized around the complex set of facts and legal claims surrounding Julian Assange's refuge in the Embassy of Ecuador in London from 2012 to 2019. The problem combines elements of classic interstate relations involving the immunity of diplomatic missions and extradition, with some of the dramatic changes that have reshaped international law in the post–World War II era, including the increased prominence of international organizations and non-state actors and the development of new doctrinal areas such as human rights and regulation of the internet. Chapter 1 concludes by sketching some of the conceptual challenges that characterize the field, noting both the increasing legalization of international relations and the gaps, inadequacies, and problems that remain. It also outlines some of the many different conceptual approaches that could be applied to understand international law, from natural law to positivism to more recent interdisciplinary methods.

Chapter 2 provides the basic analytical framework for understanding the generation, interpretation, and application of international legal norms. The chapter relies on several concrete problems to illustrate how states come to agree on international legal norms, why states and other actors might prefer one form of international law to another in a given context, and the processes by which international legal norms change over time. Together, Chapters 1 and 2 provide an overview of the field of international law as well as some of the analytical and doctrinal tools for assessing the subject-specific problems that appear in the chapters that follow.

1

Tracing the Evolution of International Law

International law developed over many centuries as a way for global actors to solve, manage, channel—and ignore—various global interactions and problems. That law has always been a product of its makers and their political power to create and enforce rules that they see as serving their ends. To present how international law operates and frame its development, we start with a recent incident: Julian Assange's long stay in Ecuador's embassy in London. The legal aspects of the Assange saga involve both the state-centric, traditional international legal process and more recent processes that flow from the participation of other kinds of actors, such as international organizations, individuals, and non-governmental organizations. The problem is presented as a narrative, more or less in chronological order, with the relevant international documents introduced at each phase of the story. In the historical review that follows, we return to these documents to place them in historical context.

I. AN INTERNATIONAL LAW PROBLEM: JULIAN ASSANGE'S ODYSSEY

Julian Assange, an Australian-born computer programmer and hacker, founded WikiLeaks in 2006 with the goal of exposing the secrets of governments worldwide. WikiLeaks rose to global prominence in 2010 when it published a trove of sensitive documents pertaining to U.S. war efforts in Iraq and Afghanistan. Unsurprisingly, U.S. officials reacted with outrage.

A. The Attempt to Arrest Assange

As WikiLeaks was making headlines for leaking information about the U.S. war efforts, Assange found himself in legal trouble stemming from alleged sexual misconduct with two women in Sweden in 2010. In November 2010, when Assange was residing in the United Kingdom, Sweden issued a European Arrest Warrant, a request for his arrest for rape and molestation. The warrant was binding on all of the member states of the European Union (EU), which at the time included the UK, under the following decision of the EU's chief lawmaking arm, the European Council.

Julian Assange in the Ecuadorian Embassy in London, August 19, 2012
Source: Olivia Harris/Reuters

Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States

E.U. O.J. L 190 (2002)

THE COUNCIL OF THE EUROPEAN UNION . . .

Whereas. . . .

(1) . . . [T]he introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. . . .

(12) . . . Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person . . . when there are reasons to believe . . . that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation. . . .

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Definition of the European arrest warrant and obligation to execute it

1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision. . . .

Article 2

Scope of the European arrest warrant

1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State . . . for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State . . . for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall. . . . give rise to surrender pursuant to a European arrest warrant [the list includes rape].

4. For offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

Additionally, at Sweden's request, the International Criminal Police Organization (INTERPOL) issued a so-called "Red Notice" for Assange's arrest; a Red Notice is not legally binding but alerts INTERPOL's members of an arrest warrant by one of its members. Assange denied the accusations and expressed concern that if he were returned to Sweden, he would be extradited to the United States, where he might be subject to the death penalty. In particular, Assange feared that he might be indicted under the U.S. Espionage Act for his publication of documents obtained by former U.S. Army intelligence analyst Chelsea Manning. An indictment could include conspiracy to violate this provision:

> Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, . . . plan, map, . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . shall be fined under this title or imprisoned not more than ten years, or both.

28 U.S.C. Section 793(d). Another provision of the same law imposes the death penalty or life imprisonment for delivering such information to "any foreign government."

Assange's concern was not unfounded; the United States has an extradition treaty with Sweden that was amended in part by a 2003 treaty with the EU (which also includes Sweden):

Convention on Extradition Between the United States of America and Sweden

494 U.N.T.S. 142 (1961)

Article I

Each Contracting State undertakes to surrender to the other . . . those persons found in its territory who have been charged with or convicted of any of the offenses specified in Article II of this Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article IV of this Convention; provided that such surrender shall take place only upon such evidence of criminality as, according

to the laws of the place where the person sought shall be found, would justify his commitment for trial if the offense had been there committed.

Article II

Extradition shall be granted . . . for the following offenses [the Convention's list of specific offenses was amended by the 2003 treaty with the EU to cover any crimes punishable by at least a year in prison]. . . .

Article IV

2. When the offense has been committed outside the territorial jurisdiction of the requesting State, the request for extradition need not be honored unless the laws of the requesting State and those of the requested State authorize prosecution of such offense under corresponding circumstances.

Article V

Extradition shall not be granted in any of the following circumstances: . . . .

5. If the offense is regarded by the requested State as a political offense or as an offense connected with a political offense.

The 2003 treaty with the EU adds the following:

Article 13 Capital punishment

> Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought . . . If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

So, under the treaty, Sweden could deny extradition if it found espionage to be a "political offense" (Article V) or if the United States insisted on the option of imposing the death penalty (Article 13 of the later treaty with the EU). Indeed, Swedish courts have routinely refused to extradite for espionage, leading some to speculate that the United States was considering other charges regarding mishandling of classified information against Assange.

B. Assange Seeks Diplomatic Asylum

In December 2010, Assange was arrested in the United Kingdom but then released on bail. In June 2012, after the UK Supreme Court affirmed Assange's extradition to Sweden, he entered the Ecuadorian embassy in London seeking political asylum—a formal protection offered by one state to a person fleeing suspected harm by another state, in this case, arrest by the UK. At the time, Ecuador's left-wing government had a tense relationship with the United States. Two months later, Ecuador granted Assange political asylum through its embassy to the United Kingdom.

In a lengthy statement issued at the time, the Ecuadorian government defended its actions:

> Article 41 of the Constitution of the Republic of Ecuador defines clearly the right to grant asylum. . . . [T]he rights to asylum and shelter are fully recognized, according to the law and international human rights instruments. According to such constitutional norm: "People who are in a situation of asylum and shelter will enjoy special protection that guarantees the full exercise of their rights. The State will respect and guarantee the principle of no return, aside from the humanitarian and judicial emergency assistance". . . .
>
> Ecuador has been able to verify . . . that the structure of this right [to asylum] accords with fundamental principles of general international law, [including]:
>
> 1. [A]sylum in all its forms is a fundamental human right and creates obligations *erga omnes*, meaning, "for all", the States. . . .
>
> 6. . . . [A]sylum has always the same lawful cause and purpose, meaning, political persecution, which is a lawful cause; and to safeguard the life, personal safety and freedom of the protected person which is a lawful purpose. . . .
>
> 9. The lack of [an] international convention [on the right to asylum] or internal legislation of the States cannot be legitimately claimed to limit, impinge or deny the right to asylum. . . .
>
> [S]tates, having contracted through numerous and substantive international instruments — many of them judicially binding — the obligation to provide protection or asylum to people persecuted for political reasons, have expressed their will to establish a legal institution of protection of human rights and fundamental freedoms . . . Some of those instruments are mentioned bellow[sp] [the list included 16 treaties and other legal instruments, including]:
>
> 1. **United Nations Charter** of 1945, Purposes and Principles of the United Nations: obligation of all the members to cooperate in the promotion and protection of human rights;
>
> 2. **Universal Declaration of Human Rights** of 1948: the right to seek and enjoy asylum in any country, for political reasons (Article 14);
>
> 3. **American Declaration of the Rights and Duties of Man** of 1948: the right to seek and enjoy asylum in any country, for political reasons (Article 27);
>
> The Government of Ecuador considers [it] important to outline that the norms and principles recognized in the international instruments mentioned, and in other multilateral treaties, have preeminence over the internal laws of the States. . . .
>
> [O]ur country has appealed to obtain from the United Kingdom the strictest guarantees so Julian Assange faces, with no obstacles, the judicial process begun in Sweden. Such guarantees include that . . . he would not be extradited to a third country . . . Unfortunately . . . the United Kingdom never gave proof of wanting to achieve political compromises. . . .
>
> With this background, the Government of Ecuador . . . has decided to grant diplomatic asylum to the citizen Julian Assange . . . for which the Ecuadorian Government. . . . assumes that there are indications that allow to assume that there may be political persecution. . . .

Statement of the Government of the Republic of Ecuador on the asylum request of Julian Assange, August 18, 2012.

Ecuador's assertion that it had a legal right to grant Assange asylum in its embassy was not unprecedented, and similar claims had already been the subject of prior legal disputes between states. In 1950, after Colombia granted diplomatic asylum in its embassy in Lima to a Peruvian revolutionary leader who was seeking to avoid arrest by the government, Colombia sued Peru in the International Court of Justice (ICJ), the UN's principal judicial organ. Colombia claimed that Peru had a legal duty to honor Colombia's decision and allow for the asylee's safe departure from Peru. Part of Colombia's argument was that the practice of states in Latin America in occasionally granting asylum had given rise to a unilateral right to do so under customary international law, which emerges organically from state interactions and, unlike treaty law, does not derive its authority from a binding text. The ICJ rejected Colombia's claim that it had the right to grant asylum and found that Peru did not have a duty to honor that decision.

Asylum Case (Colombia v. Peru)

1950 I.C.J. 266 (Nov. 20)

The Party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. . . .

[T]he Colombian Government has . . . cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification, [in particular] the Montevideo Convention of 1933 [which granted states significant flexibility to grant asylum]. . . . It is contended that this Convention has merely codified principles which were already recognized by Latin-American custom, and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument. . . .

[T]he Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or—if in some cases it was in fact invoked—that it was . . . exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the officia1 views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in al1 this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence. The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. . . .

Latin American states responded to that ruling by concluding a treaty in 1954—the OAS Convention on Diplomatic Asylum—that gave those states significant leeway to grant asylum. The UK was not a party to that treaty and thus was not bound by its terms.

C. The UK Reaction

The UK made clear that, if Assange ever left the embassy, he would immediately be arrested; Ecuador had no obvious legal strategy for ensuring his passage to Ecuador. The UK did not, however, enter the embassy premises to arrest Assange. The reasons may lie in another international legal obligation, found in the 1961 Vienna Convention on Diplomatic Relations (VCDR), to which nearly all states, including Ecuador and the UK, are party.

Vienna Convention on Diplomatic Relations
500 U.N.T.S. 95 (1961)

Article 3

1. The functions of a diplomatic mission consist inter alia in:

(a) representing the sending State in the receiving State;
(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) negotiating with the Government of the receiving State;
(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations. . . .

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission. . . .

In September 2012, the UK foreign minister stated to Parliament: "I have been consistently clear that we are not threatening the Embassy of Ecuador and that we are absolutely committed to the principles of the 1961 Vienna Convention on Diplomatic Relations and always act in accordance with it." Instead, beginning in 2012, the UK sent police to stand outside the embassy while refraining from entering it. (During the first three years, the monitoring was around the clock and cost about $19 million.) Note that Ecuador's potential violation of the Vienna Convention in using the embassy for purposes not listed in Article 3 (although that article does say "inter alia") was not invoked as any kind of justification for the UK to suspend its obligations under Article 22.

D. Advice from a UN Expert Body

In late 2014, Assange sent a petition to the United Nations Working Group on Arbitrary Detention, a panel of five independent experts created under the auspices of the UN Human Rights Council, an intergovernmental body composed of 47 states. Assange claimed that Sweden and the UK were violating his right against arbitrary detention, which

is unlawful under the 1966 International Covenant on Civil and Political Rights (ICCPR), one of the principal global human rights treaties. In addition, Human Rights Watch and Amnesty International, two non-governmental organizations (NGOs), voiced concern over the possibility of Assange being extradited to the United States, arguing that a prosecution under the U.S. Espionage Act would violate his right to free expression and that his detention might constitute cruel or degrading treatment, both violations of the ICCPR.

In late 2015, after hearing from Swedish and UK representatives, the Working Group issued the following report. The report is not, by its terms, legally binding on states, but its interpretations of the law are sometimes treated as authoritative and can be influential in shaping expectations or actions.

Opinion No. 54/2015 concerning Julian Assange (Sweden and the United Kingdom of Great Britain and Northern Ireland)

UN Working Group on Arbitrary Detention, U.N. Doc. A/HRC/WGAD/2015/54 (2016)

88. . . . Despite the fact that . . . Ecuador has granted him asylum in August 2012, his newly acquired status has been recognized by neither Sweden nor the UK. Mr. Assange has been subjected to extensive surveillance by the British police during his stay at the Ecuadorian Embassy to this date.

89. [T]he Working Group considers that, in violation of . . . articles 9 [due process rights concerning detention] and 14 [trial-related due process rights] of the [ICCPR], Mr. Assange has not been guaranteed the international norms of due process and the guarantees to a fair trial during these three different moments: the detention in isolation in Wandsworth Prison, the 550 days under house arrest, and the continuation of the deprivation of liberty in the Embassy of the Republic of Ecuador in London, United Kingdom.

91 . . . Placing individuals in temporary custody in stations, ports and airports or *any other facilities* where they remain under constant surveillance may not only amount to restrictions to personal freedom of movement, but also constitute a de facto deprivation of liberty. . . .

93. The . . . only basis of the deprivation of liberty of Mr. Assange appears to be the European Arrest Warrant [(EAW)]issued by the Swedish prosecution based on a criminal allegation. Until the date of the adoption of this Opinion, Mr. Assange has never been formally indicted in Sweden. The [EAW] was issued for the purpose of conducting preliminary investigation in order to determine whether it will lead to an indictment or not. . . .

98. [T]he current situation of Mr. Assange staying within the confines of the Embassy of . . . Ecuador . . . has become a state of an arbitrary deprivation of liberty [because:] (1) Mr. Assange has been denied the opportunity to provide a statement . . . , the access to exculpatory evidence, and thus the opportunity to defend himself against the allegations; (2) the duration of such detention is . . . incompatible with the presumption of innocence. Mr. Assange has been denied the right to contest the continued necessity and proportionality of the arrest warrant in light of the length of . . . his confinement in the Ecuadorian Embassy; (3) the indefinite nature of this detention, and the absence of an effective form of judicial review . . . and the highly intrusive surveillance, to which Mr. Assange has been subjected; (4) the Embassy . . . is not . . . a house or detention centre equipped for prolonged pre-trial detention and lacks appropriate and necessary medical equipment or facilities. It is valid to assume,

after 5 years of deprivation of liberty, Mr. Assange's health could have been deteriorated . . . and he was denied his access to a medical institution for a proper diagnosis. . . . A position is maintained in which his confinement within the Ecuadorian Embassy is likely to continue indefinitely. . . .

99. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Assange is arbitrary and in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, and articles 7, 9(1), 9(3), 9(4), 10 and 14 of the International Covenant on Civil and Political Rights [which provide that no one shall be subject to arbitrary arrest or detention, and that everyone is entitled to a fair and public hearing before an impartial tribunal.]

One member of the Working Group dissented, noting:

> 3. Mr. Assange fled the bail in June 2012 and since then stays at the premises of the Embassy using them as a safe haven to evade arrest. Indeed, fugitives are often self-confined within the places where they evade arrest and detention. . . . [T]hese territories and premises of self-confinement cannot be considered as places of detention for the purposes of the mandate of the Working Group.
>
> 4. In regard to the house arrest of Mr. Assange in 2011-2012, it was previously emphasised by the Working Group that where the person is allowed to leave the residence (as in Mr. Assange's case), it is "a form of restriction of liberty rather than deprivation of liberty, measure which would then lie *outside the Group's competence*" [quoting an earlier Working Group opinion]. . . . As soon as his last application was dismissed by the Supreme Court in June 2012, Mr. Assange fled the bail.

The British Foreign Secretary called the Working Group's finding "ridiculous."

E. A New Government in Ecuador Reacts

In 2016, Ecuador briefly cut off Assange's internet access after WikiLeaks published documents from the U.S. Democratic National Committee during the U.S. electoral campaign. (The U.S. government later alleged that WikiLeaks received these documents directly from Russian state-supported hackers.) Ecuador claimed that interfering in the election violated the principle of international law that provides that one state may not intervene improperly in the internal affairs of another state. In 2017, after Sweden dropped its rape investigation of Assange, he remained in the embassy because he feared extradition to the United States under the UK's 2003 bilateral extradition treaty with the United States. That treaty's key provisions are similar to those of the U.S.-Sweden treaty, thereby obligating the UK to extradite Assange, subject to the same limitations for political offenses and guarantees of non-imposition of the death penalty.

In 2017, Ecuador elected a new president who seemed less supportive of Assange's stay. Relations with Assange worsened. In April 2019, with no public notice, Ecuador revoked Assange's refuge, granting permission to the London police to arrest him. He was carried out of the embassy on April 19 and immediately put in jail for breaching his prior jail convictions. The same day, the United States announced that it had secretly indicted him for conspiracy to commit a breach of U.S. government computers—a violation of the Computer Fraud and Abuse Act—and would seek his extradition from the United Kingdom. A month later, the United States amended the indictment

to include 17 charges under the Espionage Act, including the provision quoted above (but not any charges that carry the death penalty or life imprisonment). In June 2019, the UK home secretary approved an extradition request from the United States. Assange vowed to fight extradition in the British courts, and a court hearing is scheduled for 2020.

Ecuador's retraction of its invitation to Assange was defended by the country's president, Lenin Moreno, in a lengthy speech. He stated:

> Granting or withdrawing asylum is a sovereign right of the Ecuadorian state, according to international law. Today, I announce that the discourteous and aggressive behavior of Mr. Julian Assange, the hostile and threating declarations of its allied organization, against Ecuador, and especially the transgression of international treaties, have led the situation to a point where the asylum of Mr. Assange is unsustainable and no longer viable. . . . Mr. Assange violated, repeatedly, clear-cut provisions of the conventions on diplomatic asylum. . . . He particularly violated the norm of not intervening in the internal affairs of other states. The most recent incident occurred in January 2019, when WikiLeaks leaked Vatican documents. . . . In line with our strong commitment to human rights and international law, I requested Great Britain to guarantee that Mr. Assange would not be extradited to a country where he could face torture or the death penalty. The British government has confirmed it in writing, in accordance with its own rules. . . . Ecuador is guided by the principles of law, complies with international law and protects the interests of Ecuadorians.

International law was an integral part of the Assange incident. Throughout, various actors—not only states—used international law to structure their interactions, advance particular legal positions, justify their own actions, and acknowledge specific legal rights and obligations. As we have already seen, they invoked international law to assert certain rights (e.g., the right to grant Assange asylum or the right not to be subject to extradition to the United States) and duties (e.g., the duty to arrest Assange or the duty to respect the embassy's diplomatic immunity). These claims were grounded in international instruments that have varying degrees of legal authority, as well as in domestic laws that implement or interpret those instruments, including:

- Multilateral/global treaties—Vienna Convention on Diplomatic Relations; International Covenant on Civil and Political Rights
- Multilateral/regional treaties—Treaty on European Union; OAS Convention on Diplomatic Asylum
- Bilateral treaties—U.S.-Sweden Extradition Treaty; U.S.-UK Extradition Treaty
- Customary international law—Right to provide diplomatic asylum
- International judicial decisions—The ICJ decision regarding asylum in the *Asylum Case*
- International soft law instruments—The UN Working Group's Opinion on Julian Assange; Interpol's Red Warrant
- Domestic court decisions interpreting international legal obligations—The UK Supreme Court decision approving Assange's extradition to Sweden
- Executive branch decisions—The British Foreign and Commonwealth Office rejection of the findings of the UN Working Group; the U.S. Justice Department's decision that U.S. criminal law reached conduct of Assange that occurred outside the United States; the Ecuadorian President's decision to revoke Assange's asylum; the British Home Secretary's decision to approve the U.S. extradition request

The claims that were advanced were decidedly legal, not just political, in nature, but they were not a prelude to any international judicial decision on Assange's fate (although certain domestic courts in Sweden and the UK played a role). Indeed, judicial resolution of international legal disputes is still the exception, not the norm. And although many of the founders and practitioners of modern international law share the aspiration to regularize resort to tribunals for the settlement of international disputes, judicial resolution is by no means the only way in which the law can be decisive or influential. In the Assange case, the only global institution to address his stay in the embassy was the UN Working Group on Arbitrary Detention, whose recommendations are not binding.

The Assange case thus highlights an important feature of international law—its so-called "horizontal" structure. Law is made by many actors whose relations are not defined through an established hierarchy. Law is variously interpreted and applied by individual states, as well as by third-party decision makers, at both the international and the domestic level. The implementation and enforcement mechanisms are similarly horizontal. Law can be enforced by states acting alone or in concert, or through international institutions, but enforcement is not guaranteed; these actors may choose not to enforce the law. And with a few notable exceptions (like the UN Security Council), most enforcement decisions are not binding on all states. These differences from much—but not all—of domestic law makes international law simultaneously rich, complex, and frustrating as a subject of study.

II. TRACING THE EVOLUTION OF INTERNATIONAL LAW

A. The Law of Nations in Its Traditional Incarnation

The Assange case has key elements of a traditional international legal dispute: many of the key actors are states, which have historically been the principal participants in the international legal system. States make international law in different ways. In the Assange case, Sweden, the UK, and Ecuador all relied on formal legal instruments to advance their policy positions. Some of these instruments were bilateral treaties, such as the UK-Sweden extradition agreement; others were multilateral treaties, such as the Vienna Convention on Diplomatic Relations. In addition, Ecuador invoked customary international law to claim the right to grant Assange political asylum.

To gain a sense of how international law works, one must have some grasp of its history. Legal historians differ significantly, however, in the starting point for such a history. From their earliest days, organized political communities have entered into agreements to structure and regulate their interactions. For instance, in the thirteenth century B.C., the Egyptian pharaoh Rameses II entered into a Treaty of Peace, Alliance, and Extradition with a neighboring king; Asian kingdoms routinely engaged in similar practices. Ancient entities settled some disputes through accords, though recourse to war was also common. Most historians of international law nonetheless focus on Europe as the birthplace of modern international law; as indicated in the following excerpt, they regard the law's key formative years as the time of the decline of the Holy Roman Empire and the birth of new states in Europe.

Werner Levi, *Contemporary International Law*
6-13 (2d ed. 1991)

Mainly as a result of new economic forces, the Holy Roman Empire broke down, which brought about the collapse of the at least nominally centralized order of Europe and foreshadowed the need for a different legal system. . . .

As new centers of independent power arose, laws regulating their coexistence and relations were needed, although until the age of absolutism had passed, these laws had to refer to the person of the rulers more than to political entities. Gradually, the relationships of subordination and superordination under the universalist reign of one emperor and pope were replaced by a system of coordination among sovereign rulers. The feudalistic entities with their relatively uncertain borders gave way to states based upon sharply defined territory. . . . The preeminent role of territory in international law began. . . .

Early Writers on International Law

During these first centuries in the development of international law, legal and political writers . . . collected existing norms and suggested new ones. And they provided the theoretical and philosophical foundations, justifications, and guidelines for the international legal system, always keeping in mind the interests of their countries.

. . . The Spaniard Francisco Vitoria (1480-1546) argued that Spain was obliged to treat the conquered Indians in the Americas humanely, and he even granted these Indians a limited right to conduct "just wars" against their cruel conquerors. But he defended Spain's right in principle to create overseas dependencies and to exploit them. Another Spaniard, Francisco Suárez (1548-1617), dealt with the by then obvious interactions of states and how to regulate them. Like all writers of the era he was particularly concerned with the nature of just war and rules for its conduct. The Italian Alberico Gentili (1552-1608)—in contrast to his Spanish colleagues, who were both professors of theology—emphasized the secular nature of international law. He therefore deduced the rules of the law not from some metaphysical source but from the practice of states and the writings of historians. He was thus the first representative of the "positivists," who argue that law is created by humans for definite conditions and purposes rather than by some supreme being for all eternity. . . .

Outstanding [among early treatises] was Hugo de Groot's (Grotius, 1583-1645) *De iure belli ac pacis* (On the Law of War and Peace), which brought him the sobriquet "father of international law." He became equally influential in writing on the laws of treaties, extraterritoriality, and the sea while focusing on the law of war and on the theoretical foundation of international law. Grotius believed that there was a law of nature (not necessarily divine) that could be implemented, not counteracted, by people using right reason. The combination of these two sources was, to Grotius, the foundation of international law. By this argument he avoided commitment to a particular religion and deliberately so, for he felt that to be effective, international law had to be acceptable to all, conceivably even "infidels." . . . Three doctrines [that are still relevant today] are the applicability of laws of war to all parties regardless of the justness of the war, freedom of the seas (argued in his book *Mare liberum* and a particularly important concept for a Dutchman to undo the claims of England and other states to dominion over the seas), and extraterritoriality of ambassadors. . . .

In spite of Grotius's influence, writers continued to argue in their treatment of international law either the naturalist or the positivist view, although they did so with varying degrees. The Germans Samuel Pufendorf (1632-1694) and Christian Wolff (1676-1756) and the Swiss Emmerich de Vattel (1714-1767) could generally be classified as naturalists. The Englishman Richard Zouche (1590-1660) represented the positivist school. But few of these writers were extremists, and most took account of state practice. . . .

The geographical ambit of international law and its approach to the diversity of actors in the international system during its formative centuries remains a subject of great

importance. Levi's Eurocentric vision is echoed in the first edition of the leading English-language treatise on international law.

Lassa Oppenheim, *International Law, vol. 1, Peace*

30-31, 34, 218-219, 266-267 (1905)

§26. . . . There is no doubt that the Law of Nations is a product of Christian civilisation. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. Between Christian and Mohammedan nations a condition of perpetual enmity prevailed in former centuries. And no constant intercourse existed in former times between Christian and Buddhistic States. But from about the beginning of the nineteenth century matters gradually changed. A condition of perpetual enmity between whole groups of nations exists no longer either in theory or in practice. And although there is still a broad and deep gulf between Christian civilisation and others, many interests, which knit Christian States together, knit likewise some non-Christian and Christian States.

§27. Thus the membership of the Family of Nations has of late necessarily been increased and the range of dominion of the Law of Nations has extended beyond its original limits. . . . [T]here are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member. . . .

§29. The Law of Nations as a law between States based on the common consent of the members of the Family of Nations naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family. . . .

§169. The territory of a State may consist of one piece of the surface of the globe only, such as that of Switzerland, [or it] may also be dismembered and consist of several pieces, such as that of Great Britain. All States with colonies have a "dismembered territory." . . . Colonies rank as territory of the motherland, although they may enjoy complete self-government and therefore be called Colonial States. . . .

Consider the following two perspectives on the history of international law and the state of that law by the nineteenth century.

R.P. Anand, *The Influence of History on the Literature of International Law*

The Structure and Process of International Law 342-343 (R.St.J. MacDonald & D.M. Johnston eds., 1983)

There is little doubt that in some form or another, rules of inter-state conduct or what we now call international law can be traced to some of the most ancient civilizations,

like China, India, Egypt and Assyria. Apart from just and humane rules of war and peace, one can find numerous rules and regulations on the law of treaties, right of asylum, treatment of aliens and foreign nationals, the immunities and privileges of ambassadors, modes of acquiring territory, and even glimpses of the law of the sea and maritime belt. . . . "Several families of nations existed or coexisted in areas such as the ancient Near East, Greece and Rome, China, Islam and Western Christiandom, where at least one distinct civilization had developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war."

Although many of these systems of inter-state rules and practices were confined to one or two civilizations, and disappeared with the disappearance of those civilizations, it would be wrong to dismiss them as not international law or as of no consequence and merely "religious precepts" or moral obligations. . . . [N]ecessities in intercourse between nations in different civilizations probably provoked similar responses and similar rules and institutions, such as the immunity of foreign envoys and the establishment of durable treaty relationships. . . .

[L]ong before the emergence of Europe as the center of the world stage, relations between Europe and Asia were conducted on the basis of well-recognized rules of inter-state conduct which were supposed to be universally applicable to all states. [W]hen European adventurers arrived in Asia in the fifteenth century "they found themselves in the middle of a network of states and inter-state relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilization." . . . The confrontation of the Asian and European states "took place on a footing of equality and the ensuing commercial and political transactions, far from being in a legal vacuum, were governed by the law of nations as adjusted to local inter-state custom." The East Indies constituted the meeting ground of the Dutch, English, French and other European East India companies, on the one hand, and Asian sovereigns on the other. . . .

Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*

40 Harv. Intl. L.J. 1, 22, 25, 29, 30, 49, 69, 79, 80 (1999)

. . . [A] central feature of positivism was the distinction it made between civilized and uncivilized states. The naturalist notion that a single, universally applicable law governed a naturally constituted society of nations was completely repudiated by jurists of the mid-nineteenth century. Instead, nineteenth-century writers such as Wheaton claimed that international law was the exclusive province of civilized societies. . . .

. . . [T]he distinction between the civilized and uncivilized was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework. The racialization of positivist law followed inevitably from these premises—as demonstrated, for example, by the argument that law was the creation of unique, civilized, and social institutions and that only states possessing such institutions could be members of "international society." . . .

The concept of society enabled positivists to develop a number of strategies for explaining further why the non-European world was excluded from international law. One such strategy consisted of asserting that no law existed in certain non-European, barbaric regions. . . . A second strategy used to distinguish the civilized from the uncivilized consisted of asserting the fact that while certain societies may have had their own systems of law these were of such an alien character that no proper legal relations could develop between European and non-European states. . . .

The problem of the legal personality of non-European peoples could be most simply resolved by the actual act of colonization, which effectively extinguished this personality. Once colonization took place, the colonizing power assumed sovereignty over the non-European territory, and any European state carrying on business with that territory would deal with the colonial power. In this way, legal relations would once again take place between two European powers. . . .

Sovereignty manifested itself quite differently in the non-European world than in the European world. First, since the non-European world was not "sovereign," virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples. European states could engage in massive violence, invariably justified as necessary to pacify the natives and followed by the project of reshaping those societies in accordance with their particular vision of the world. [Second,] lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory. . . . This is evident in the partition of Africa, which was determined in accordance with the needs of the major European states. . . .

. . . [T]he nineteenth century offers us an example of a much broader theme: the importance of the existence of the "other" for the progress and development of the discipline itself. . . . [T]he nineteenth century is simply one example of the nexus between international law and the civilizing mission. The same mission was implemented by the vocabulary of naturalism in sixteenth-century international law. . . . [T]he only thing unique about the nineteenth century is that it explicitly adopted the civilizing mission and reflected these goals in its very vocabulary. The more alarming and likely possibility is that the civilizing mission is inherent in one form or another in the principal concepts and categories that govern our existence: ideas of modernity, progress, development, emancipation, and rights. . . .

By the nineteenth century, states had used international law to establish principles and rules regarding a number of the issues in the Assange problem. First, states had placed embassies and consulates in one another's territory and agreed that those buildings, and the emissaries associated with them, would enjoy various privileges and immunities. These would later be codified in multilateral form in the Vienna Conventions on Diplomatic and Consular Relations. Second, some states seeking to cooperate on enforcement issues—in particular on the return of fugitives—concluded bilateral extradition treaties. The first UK-U.S. extradition obligations date to 1794.

But the mutual respect that states afforded one another through diplomatic and extradition treaties only extended so far. As the Anghie excerpt makes clear, international law also developed an entire doctrine to justify acquisition of territory by colonial powers. That law recognized, for instance, that European states could acquire so-called empty land, despite the presence of indigenous peoples who may have been living on the territory for thousands of years. It also justified the colonial presence by placing great weight on treaties of cession whereby indigenous peoples signed over control of their land to colonial powers, despite the coerced nature of many of these agreements. One question to consider as you read subsequent problems in this book is the extent to which international law's colonial legacy continues to influence contemporary international law.

B. International Law's Development in the Last Hundred Years

The twentieth century brought about sea changes in the entire field of international law. As a historical matter, most of these changes originated in the gradual global transformation

that began with World War I, as the populations of European states—and of some of their colonies—decimated themselves in combat over control of small pieces of land. As a result of that war, at least three constitutive changes in the international legal order began. We outline them here and discuss them in more detail throughout the remainder of the book.

First, European states began to accept that unlimited recourse to war to resolve disputes was counterproductive to their national interests and that recourse to war should be regulated by law. (The states of Europe and Latin America had already agreed, at meetings in The Hague in 1899 and 1907, that the *methods* by which wars were conducted should also be limited, leading to the development of the modern law of war.) By 1928, European and American governments had agreed upon the Treaty Providing for the Renunciation of War as an Instrument of National Policy, the so-called Kellogg-Briand Pact.

Second, in the territorial shakeup that ended World War I, European and U.S. leaders concluded that some ethnic groups in Europe that lacked their own state should determine their own political future. As a result, the victorious World War I Allies carved new states out of the defeated Central Powers based in significant part on the principle of national self-determination, part of American President Woodrow Wilson's Fourteen Points (announced in January 1918 as the U.S. goals in the war). In addition, European leaders agreed on a network of treaties and arrangements aimed at protecting ethnic minority groups within both new and newly enlarged states. This concern with self-determination and minority rights remained, however, quite circumscribed, for European states did not recognize their application to their colonies nor to minorities within the Allied states.

Third, after World War I, the independent states agreed on a fundamental institutional arrangement to address questions of war and peace and develop legal norms in other areas, such as labor, health, and communications. This organization, the League of Nations, was created by the Versailles Treaty ending World War I. The League transcended prior forms of international institutionalization; it was an organization with decisionmaking bodies and a large, permanent Secretariat. Along with its specialized bodies, such as the International Telecommunication Union and the International Labour Office, the League studied and promoted international cooperation on numerous issues of transnational interest. The result was a shift in the way much international law was made, as the League took the lead in preparing multilateral treaties, encouraged states to reach bilateral agreements, and drafted many influential nontreaty instruments. In addition, the world's first standing global court—the Permanent Court of International Justice—began to decide a handful of cases, leading some to believe that the future for the settlement of disputes through international adjudication was bright indeed. Outside of the League, the first incarnation of INTERPOL—the international organization that transmitted the Red Notice for Assange's arrest—was created during this period, publishing wanted persons notices for the first time in 1923.

The prospects for legal arrangements to regulate international affairs were soon overshadowed by the sequential aggression of the fascist states—Japan, Italy, and Germany—in China, Ethiopia, and central Europe. The League's members showed no political will to enforce by economic sanctions or military force the legal commitments states had undertaken in the areas of recourse to force or protection of minorities, and America's absence from the League due to the U.S. Senate's rejection of the Versailles Treaty only worsened matters. Much of the apparent progress of international law proved illusory during the 1930s. The cataclysm that followed—50 million dead, Germany's campaign to exterminate European Jews and others, the obliteration of cities by both sides, the use of nuclear weapons, and the continued subjugation of colonial peoples—left little room for optimism about the possibility for the role, let alone the rule, of law in international relations.

Yet World War II proved the catalyst for the acceleration of the major trends that began before it started, as well as for the participation of new actors in the international legal process. Thus, states oversaw the change in substantive law with respect to the two core issues that had proved significant before the war—the use of force and human rights. With respect to the first issue, governments agreed in the UN Charter to ban the use of force against states except in two situations—when a state was responding in self-defense and when the United Nations itself authorized force against a state. Wars hardly ceased as a result of the UN Charter, but states did begin to refrain from the sort of aggression against neighboring states, followed by annexation, that had characterized earlier years. We examine the Charter's regulation of the use of force in Chapter 13.

World War II and events after it also brought renewed attention to the issue of self-determination and human rights. Because the war exacted such a large human and financial toll on the European powers, their grip on colonial possessions significantly weakened. By the late 1940s, two of the largest—British India and the Dutch East Indies—had achieved independence (in the former case through civil disobedience; in the latter through armed conflict) as India, Pakistan, and Indonesia. Most of the rest of Africa and Asia followed suit within a dozen years, usually without significant violence. The independence of these new states vastly changed the legal landscape, as they came to have a significant role in the development of international norms. Their perspectives, molded by centuries of colonial domination, exerted a major influence on the process of lawmaking and its outcomes.

With respect to human rights, the tragedy of World War II led governments to devote significant resources to the creation of a corpus of law aimed at protecting individuals from their own governments. In December 1948, the UN General Assembly proclaimed the Universal Declaration of Human Rights, which sets out a list of civil and political rights as well as various economic, social, and cultural rights. While the Universal Declaration was not intended to be legally binding, many states consider it an authoritative interpretation of the Charter. States prepared and joined treaties covering genocide, civil and political rights, economic rights, racial discrimination, women's rights, apartheid, torture, and children's rights. Among the most important of these was the International Covenant on Civil and Political Rights, which served as the legal basis for Assange's claim of arbitrary detention in the Ecuadorian embassy. Increased public consciousness about human rights also led some states to include provisions in their extradition treaties allowing them to refuse extradition requests unless the receiving state promises not to use the death penalty, as found in the 2003 extradition treaty between the EU and the United States excerpted above.

Some states took this process, and human rights generally, more seriously than other states did; indeed, for most of the period after World War II, most governments merely paid lip service to the concept of human rights as a way of influencing or currying favor with others. Nevertheless, the growth of the human rights movement fundamentally challenged the notion that states were free to do what they wanted within their own borders. For instance, the dispute over diplomatic asylum in the 1950s was treated primarily an interstate dispute between Colombia and Peru about whether Colombia was interfering in Peru's internal affairs, whereas Assange and his supporters framed his situation as one of a violation of human rights, one that caught the attention of both UN human rights mechanisms and human rights NGOs.

In another important development related to human rights, the trials of German and Japanese political and military leaders after World War II helped solidify the notion of individual duties under international law. Many defendants argued that, because they were following superiors' orders, they were immune under international law. Instead, at Nuremberg, Tokyo, and in other postwar trials, thousands of individuals were tried and

convicted, and hundreds were executed, dramatically demonstrating, as the Nuremberg Tribunal stated, that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." A number of human rights treaties, including the 1948 Genocide Convention, make individuals, rather than just states, responsible for violations. In the 1990s, the UN Security Council established ad hoc tribunals with jurisdiction to try individuals for genocide, crimes against humanity, and war crimes. In 1998, states concluded the treaty to establish the International Criminal Court (ICC). The ICC Statute gives the Court jurisdiction over those same three offenses as well as aggression; in 2014, the Court completed its first trial.

New attitudes about the use of force and human rights were, in fact, only part of the change in government attitudes after the war, for the participants in defining that order were themselves increasing in number and taking on new roles, the topic to which we now turn.

C. New Actors, New Issues, New Processes

The Assange episode illustrates some of the ways that the traditional understanding of international law as a body of rules binding on states in their relations has been supplemented by a new international legal process characterized by new actors, issues, and modalities of prescription and enforcement. This new international law has not replaced traditional international law. Rather, as we shall see throughout this book, international law is a complex and constantly evolving field; in some areas, traditional norms continue to operate relatively untouched by new norms and processes; in other areas there are deep tensions between the old and the new norms; and in yet other areas new legal principles have emerged and occupy the field. A few of the most notable features of contemporary international law are outlined below.

1. International Institutions

The institutionalization of international law that began in significant part with the League of Nations accelerated in the postwar era. The United Nations, formed when 51 states signed the UN Charter in 1945, is the paradigmatic example of a multilateral body formed to address a diverse set of issues. Like other international organizations, the United Nations acts through a number of organs.

- The *UN Security Council* has primary responsibility for maintaining international peace and security and was intended to oversee a collective security system. But Cold War rivalries quickly undermined this system, and the United Nations enjoyed only mixed success in efforts to maintain international peace and security. While the Security Council acted more assertively in the aftermath of the Cold War, it soon found itself confronting new types of challenges, including global pandemics, such as AIDS; environmental problems, such as climate change; and non-conventional security threats, such as terrorist networks. The UN is also charged with promoting the peaceful settlement of international disputes. The UN Secretariat, headed by the Secretary-General, has helped to resolve a variety of international disputes, through neutral fact finding, mediation, and other settlement-inducing activities.

- The *General Assembly*, comprised of all member states, is the UN's main deliberative organ. Its resolutions, while not binding on states, have had a formative influence in the development of international law in many areas.

- The *International Court of Justice*, the UN's principal judicial organ, provides another possible forum for dispute resolution, though only between states (not by individuals directly). As noted above, Colombia sued Peru in the hope that the Court would find that the latter was bound under international law to respect the former's grant of diplomatic asylum. Yet the Court is often not available for resolution of these disputes because of jurisdictional and other barriers. For instance, the ICJ might not have permitted Ecuador to take up Assange's claims against the UK in the ICJ because states can only assert the rights of their nationals, and Assange's main nationality is Australian, not Ecuadorian. Moreover, states choose not to use the ICJ because it can be seen as exacerbating a dispute. Thus, the UK did not sue Ecuador for violating the Vienna Convention by granting Assange asylum; Ecuador did not sue the UK for failing to recognize Assange's claim of asylum; and Australia has no interest in suing its ally the UK in the ICJ.

- The *UN Human Rights Council*, composed of 47 states, has discussed numerous country-specific and global violations of human rights, though the inclusion in its membership of many rights-violating states and the selectivity of its agenda has limited its effectiveness. But the Council's many independent experts, panels, and investigatory commissions on individual countries and general issues have written reports that have shaped international discussions of issues ranging from sexual orientation to internet privacy and provided numerous resources to domestic lawmakers and civil society. One of these groups of independent experts is the Working Group on Arbitrary Detention, which asserted that the UK had violated Assange's rights under the ICCPR.

As governments and other international actors have come to regard more and more issues as requiring some form of international cooperation, they have created *specialized organizations*. For example, in the aftermath of World War II, states created the International Monetary Fund, the International Bank for Reconstruction and Development (World Bank), and the General Agreements on Tariffs and Trade, which eventually evolved into the World Trade Organization (WTO), to address international economic issues. Other international organizations address aviation (International Civil Aviation Organization), intellectual property (World Intellectual Property Organization), health (World Health Organization), and many other policy areas. The decisions to create these bodies followed from technological developments that made interstate borders more permeable and the actions of one state more likely to influence others, a process labeled today as "globalization" but that has been occurring, in various forms, for centuries.

States have also created numerous *regional organizations*, such as the Organization of American States, to coordinate policies, including through legal instruments, at a sub-global level. The OAS, for instance, prepared the treaty on diplomatic asylum in response to the ICJ's *Asylum Case* discussed above. Of these regional bodies, the EU has emerged as the most powerful and fully developed. Under a network of treaties going back to the 1950s, EU members delegate authority for certain matters to independent EU institutions that represent the interests of the Union, its member countries, and its citizens. These institutions have generated a dense system of EU law that is separate from, and superior to, the domestic law of EU members. Thus, the European Council (the body of governmental leaders of each member state) created the European Arrest Warrant process in its 2002 Directive, which was later used by Sweden regarding Assange. Other regional organizations that have assumed particular importance to interstate interactions include the African Union, the North Atlantic Treaty Organization, and the Association of Southeast Asian Nations.

2. Non-State Actors

Actors other than states and organizations of states have come to play a critical role in the creation, interpretation, application, and enforcement of international law. Non-state actors have been integrally involved in international relations for many hundreds of years—whether as organized religions such as the Catholic Church or the large trading companies of the colonial area—and non-governmental organizations have had an influence in international lawmaking at least since the time of the antislavery movement in the nineteenth century. Yet the twentieth century saw these entities play a much more prominent role in international legal arenas.

NGOs—private, voluntary citizens' groups—today help frame agendas, mobilize constituencies, attend intergovernmental conferences to lobby governments, and even provide key staff delegations to such conferences. In addition to their enhanced roles in lawmaking, NGOs also play a critical role in enforcing and promoting compliance with international legal norms. NGOs frequently investigate and publicize state violations of international law in order to shame states and build domestic constituencies for compliance. The concerns by Human Rights Watch and Amnesty International about the implication of Assange's possible trial in the United States are examples of this "name and shame" strategy. Although the ICJ and the WTO's Dispute Settlement Body only entertain state-to-state disputes, in many recently created dispute resolution fora, particularly in the human rights area, NGOs can institute cases or intervene as parties, e.g., in the European Court of Human Rights, or provide their views to UN expert bodies addressing human rights practices in individual states.

The role of the individual in international law has also undergone significant development. As noted above, during the postwar era states have recognized an increasing number of international legal rights that individuals possess. Assange, his advocates, and various NGOs asserted numerous human rights—against arbitrary detention or cruel treatment, and to free expression and due process. Some have asserted that Assange, as a whistle-blower or journalist, enjoyed special protections under international human rights law. As noted, while asylum may have been considered an interstate dispute in the past, Assange, his supporters, and Ecuador have often grounded their claims in the vocabulary of international human rights. Individuals also play enhanced roles in the implementation and enforcement of international law, in part through their increased access to international dispute resolution bodies—including, particularly, human rights bodies.

Finally, beyond NGOs and individuals, a number of other non-state actors, including indigenous peoples, ethnic minorities, subnational units in federal states, and business enterprises, now contribute to the creation and implementation of international law. At the same time, violent non-state actors, frequently labeled terrorists, have forced upon others their own notions of international order. The enhanced activities of all these groups, along with the development of individual rights and duties discussed above, has transformed the traditional "law of nations"—with states as the exclusive lawmakers and participants—into a dynamic discipline that touches on virtually all human relationships and transactions.

3. Non-Traditional Lawmaking and Enforcement

The rise of new actors has led to diverse and imaginative ways of both making and enforcing international law. The treaty, whether bilateral, like most extradition treaties, or multilateral, like the Vienna Convention on Diplomatic Relations, remains the clearest expression of the expectations of states. But international organizations have served as the arenas for new forms of lawmaking, including a form of administrative

lawmaking by executive bodies on which only some of the organization's members sit. When governments have been unwilling to agree on treaties, they have nonetheless prepared important instruments that are meant to, and in fact do, influence governmental behavior. These instruments, sometimes referred to as "soft law," cover areas ranging from foreign investment to telecommunications to human rights. INTERPOL's "Red Warrant" represents an example of such a nonbinding but influential output of international organizations.

States, international organizations, NGOs, and others have also agreed on new methods for securing compliance with the law. Thematically, these ideas date back to the creation of the United Nations itself, as its members gave the Security Council the authority to order all states to carry out its directives on peace and security matters. Over the years, the Council has ordered economic sanctions against states and non-state entities for committing acts that constitute threats to or breaches of international peace and security. In the trade arena, states gave the WTO the authority both to adjudicate disputes between member states and to authorize a party that prevails in the dispute settlement process to raise tariffs as a means of sanctioning the loser. Even criminal law has been enforced at the international level. The United Nations created special criminal courts for the former Yugoslavia and Rwanda; and the International Criminal Court hears cases involving genocide, crimes against humanity, and war crimes. International organizations have also used new methods for monitoring state performance and inducing compliance with international legal norms, including reporting mechanisms that may embarrass a state into complying, technical assistance, and, less frequently, diplomatic, economic, and military sanctions.

Much of the impetus for these developments arose out of the end of the Cold War. During the years of intense Soviet-American ideological and military confrontation, both superpowers and their allies used international fora as much to score points against the other side as to advance international cooperation. Each side viewed proposals for legal cooperation, however legitimate, with suspicion. International organizations were often polarized along East-West lines or included members of only one bloc. As a result, their ability to address major areas of international concern was limited to areas where ideology played a relatively small role, such as health or telecommunications, or where East-West interests happened to coincide (such as the creation of UN peacekeeping operations to stabilize regional conflicts).

The end of the Cold War drastically changed the situation, as an enormous obstacle to the development and implementation of international law disappeared. The opening up of the Soviet bloc also allowed the populations of those states to exert a greater influence on foreign policy, and NGOs began to become influential as well. Yet the termination of superpower support that had kept many world leaders in power led some to respond by playing parts of their populations against each other, with catastrophic consequences for human rights in Rwanda, Congo, the former Yugoslavia, and elsewhere. In addition, the weakness or complicity of some central governments resulted in havens for terrorist networks.

The first two decades of the twenty-first century have been a period of unsettling political and economic change. New global powers such as China and India have brought new visions of global order into political and legal debates. The increased power and resources of these and other new actors have, at times, spurred reform in international bodies and processes. At other times, the increasing multipolarity of international relations slowed the pace of or stymied formalized international cooperation. For example, multilateral efforts to address global climate change ebbed and flowed until the Paris Agreement of 2015; and the international response to the 2008 global financial crisis

was not centered in formal institutions, but rather in the relatively informal and ad hoc Group of 20.

Finally, the rise of nationalist leaders and movements has sparked new challenges to the international legal order. Brexit is just one example of popular dissatisfaction with treaties that promote greater economic and political integration. The dramatic slowdown in the negotiation of new treaties and creation of new international institutions reflects, in part, widespread beliefs that the benefits of globalization have disproportionately advantaged the wealthy and powerful. And President Trump's announcement of U.S. withdrawal from the Paris Climate Accord, discussed in more detail in Chapter 11, and the decision by the Philippines to withdraw from the International Criminal Court illustrate the "backlash" that challenges many international legal regimes and institutions. Whether and how the international legal order that emerged after the Second World War will adjust to these new realities has become a critical question.

III. CONCEPTUAL CHALLENGES

In the aggregate, the dramatic changes outlined above raise a number of practical, doctrinal, and conceptual challenges to those who seek to understand, practice, or improve international law. These challenges arise in part from the uneasy juxtaposition of the traditional understanding of international law and more recent processes; in part from increased global interdependence and the heightened need for international cooperation to solve transnational problems; and in part from changing conceptions of the power of the state. Below, we briefly introduce four conceptual challenges that speak to the place and meaning of international law today and that are relevant to all of the subsequent chapters of this book.

A. Legalization and Its Limits

Traditionally, scholars understood international law to address a narrow range of issues; today international law addresses almost every type of human activity. The Assange affair implicates just a few of the numerous fields that have either been created or expanded since 1945, including international human rights law and the nascent law on regulating the internet and cybersecurity. Other recently developed areas, including international trade and investment law, international environmental law, and international criminal law receive extended treatment elsewhere in this text. The sheer increase in the kinds of issues and numbers of international agreements and bodies, standing alone, capture only part of the story. As we shall see throughout this text, many recent agreements and rules tend to be significantly more detailed and reach much more deeply into what was previously considered to be the domestic jurisdiction of states. Thus, both the *breadth* and *depth* of international law have increased, as the law regulates more areas than ever before and does so through processes and mechanisms that challenge a state's interest in keeping others out of its affairs—in a word, its sovereignty.

The result of these developments is, in essence, the increased legalization of international relations. Nevertheless, the move to law on the international plane is hardly uniform. While legalization has increased in some areas, such as international trade, in others, such as international monetary issues, legalization seems to ebb and flow. In addition,

the effects of legalization vary. In some contexts, international law constrains governmental actors and curbs harmful activity. In others, it empowers actors on the world stage, by allocating decisionmaking authority to them or legitimizing the decisions that they want to make. In still others, it structures interactions, identifies the considerations that are at stake in specific settings, provides the normative material for criticism or sanction, or establishes the institutional or other mechanisms for accountability or reform. Like all law, international law is a complicated social phenomenon with many facets and possible effects.

One goal of this book is to understand better this variation in the uses and effects of international law in different issue areas. In addition, through the problems examined in subsequent chapters, we explore the implicit claim that legalization encourages greater cooperation, the more effective and efficient resolution of international disputes, and a more equitable resolution of claims between parties of unequal bargaining power.

B. The Persistent Question of Compliance

Although international law might shape behavior in all sorts of ways, many international lawyers and political scientists are principally concerned with the questions of when and why states comply with their international legal obligations, given the absence of any global enforcement body akin to those found in domestic legal systems. For example, in the Assange incident, why did the United Kingdom not simply enter the Ecuadorian embassy and remove Assange? That move likely would have required only a very small police operation and almost certainly would have been met with no resistance by the embassy staff. It also would have cost significantly less than the tens of millions of pounds that the United Kingdom spent surveilling and monitoring the embassy to ensure that Assange did not escape and leave the United Kingdom. We consider compliance issues in some detail in Chapter 14, after the reader has had a chance to gauge how and whether international law actually works. For now, we simply identify several of the compliance theories that international relations scholars and international lawyers have developed.

For many years, the field of international relations was dominated by the so-called realists. Realists focus on the distribution of power and resources in the international arena as well as on its anarchic nature. They argue that nations comply with international law only when it is in their interests to do so; when interests conflict with norms, interests will prevail. Compliance thus depends on the most powerful states deciding to comply and ensuring that weaker states comply. Iraq violated international law when it invaded Kuwait in August 1990; it only "complied" with international law and withdrew from Kuwait in response to enforcement actions by a coalition of stronger states. Realists might explain the UK decision not to enter the embassy as a choice not to antagonize Ecuador, although the cost-benefit rationale would not be obvious.

So-called institutionalists agree that nations obey international law when it is in their interests to do so; however, they stress that states have both conflicting and mutual interests. Hence international regimes, comprised of institutions and norms on a particular subject, serve as mechanisms for achieving states' common aims, including by restraining them from engaging in conduct that undercuts those aims. In this view, regimes and their norms promote compliance by reducing transaction costs, providing information and dispute resolution procedures, and providing a trigger and a focus for negative responses to noncompliance. For institutionalists, the Assange episode is about the interaction of two regimes. The regime on international law enforcement cooperation requires states to carry out bilateral and regional (e.g., EU-wide) agreements to extradite suspects, with