THE LAW-GENERATING MECHANISMS OF THE LAW OF
THE SEA CONFERENCES AND CONVENTION

by

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INTRODUCTION

Our task is to determine what rules of international law applicable generally to all states have been generated by the Law of the Sea Convention or by the international conferences that led to it. If there are any such rules, then either the Convention or the conferences or both have generated those rules. The Convention and/or the conferences would thus be lawmaking or law-finding mechanisms.

There will be many arguments and conflicting positions taken by many observers about these matters. The dispute goes not only to particular asserted rules but more basically to the law-generating or law-finding mechanism. Some observers assert that the Convention can bind only its parties and that it has no additional legal effect upon non-parties. Some assert that there are a few exceptions to that principle. But in all of these controversies there appears to be a lack of clarity about the underlying mechanism. My purpose here is to

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suggest a very simple paradigm for getting at this underlying mechanism. 1

THE UNDERLYING MECHANISM

The paradigm I shall propose may perhaps best be introduced by an example of Henri Poincare. Poincare wrote in 1905 that we might deduce the mass of Jupiter in one of three independent ways: from the movement of Jupiter's satellites, from the perturbations of the major planets, or from the perturbations of the minor planets. Our three calculations will produce three numbers very close together but not identical. "This result might be interpreted," Poincare says "by supposing that the gravitation constant is not the same in the three cases. . . . Why do we reject this interpretation? Not because it is absurd, but because it is uselessly complicated."2 By far the simpler hypothesis is that gravitation is constant, and the three numbers simply represent slight deviations from the true mass of Jupiter due to measurement error.

Let us now suppose that three nations, A, B, and C, have each asserted exclusive jurisdiction over coastal waters extending outward in distances respectively of 12 miles, 100 miles, and 200 miles. If we took the more complicated hypothesis, analogous to Poincare's variable gravitational constant, we might say that in different parts of the world the breadth of the territorial sea varies according to its location: in the area of nation C it is much larger than in the area of nation A. But the simpler hypothesis by far would be that there is a territorial sea of at least 12 miles in breadth. Twelve miles, at least, is a consensus position; only beyond that is there dispute.

1 This paradigm has always been implicit in my writings on international law, but I see now that if I had been clearer about it my writings would have gained in clarity and perhaps in persuasiveness. I have been helped in recent years to see the paradigm by reading works on linguistic philosophy and the philosophy of science. The leading writers that have helped me include Wittgenstein, Putnam, Kripke, and Rorty, although I will not here refer to any particular works by these philosophers. Yet I note at the outset that studies in ontology and epistemology can be of critical usefulness to legal analysis, even though they concern questions that, at least superficially, have nothing to do with law.

2 H. Poincare, Science and Hypothesis 146 (1952).
Another example that focuses upon events that have occurred in the past ten years is that of so-called humanitarian intervention. France invaded the Central African Republic and overthrew Bokassa; Israel intervened in Uganda and rescued the hostages at Entebbe; Tanzania intervened in Uganda and overthrew Idi Amin; and we might possibly add the American invasion of Grenada that overthrew the Hudson Austin governmental group. The complex hypothesis would be that these cases are unique and prove nothing except that in particular bilateral relationships certain interventions have occurred.

A much simpler hypothesis is that there is indeed an emerging norm of humanitarian intervention, which constitutes a legal (and not merely permissible) exception to other norms prohibiting transboundary military force. The cases I have cited, then, constitute measurements of this emerging norm. The measurements may be inexact, but they get at an underlying legal reality.

The underlying physical reality in Poincare's example is the mass of Jupiter. We note at the outset that Jupiter has a mass because of the orbital perturbations of other planets. Then we make another simplifying assumption: that the mass of Jupiter does not change depending on how we measure it. Rather, it is an underlying reality. Even Poincare did not make this latter argument, because he was writing in 1904, more than two decades before Heisenberg's uncertainty principle, which stated that certain quantum measurements necessarily change the object being measured. But the uncertainty principle fits very well within Poincare's overall philosophy of physics, which, like Einstein's, is that the experimental fact comes first and that many theories may explain it.

3 Oppenheimer, who attempted to present a rigid positivist account of international law, would have classified these interventions as permissible but not legal. They would be permissible, according to Oppenheim, because nations did them and got away with them; but they would not be legal, because they violate the rule of sovereignty of states and the concomitant right of domestic jurisdiction of each state. Yet we have to object to Oppenheim's view as fundamentally incoherent. How can something be permissible and yet not legal? Such a category, if it is intelligible at all, would depend on unique factors that could never be replicated from case to case, with the result that there could be no general rules of international law. (See L. Oppenheimer, International Law 28 (H. Lauterpacht 8th ed., 1955)).
Competing theories, therefore, cannot be assessed by virtue of their correspondence with experimental results; rather, of two theories which each account for an experimental fact, select the simpler.

Now law, unlike the physical universe, is a mental construct of human beings. It might very well be the case that law varies according to who perceives it, and therefore there is no underlying legal reality to uncover. Sometimes in the writings of Professor McDougal one gets the impression that international law is different for the United States and the Soviet Union; the latter does not have the same right to engage in nuclear tests on the high seas that the United States enjoys, because the United States is in the privileged position of acting on behalf of the free world. This is a highly phenomenalistic, if not solipsistic, view of international law, one that can hardly be expected to carry argumentative weight with those nations who do not enjoy Professor McDougal's privileged status.

My position is that although law could be phenomenalistic in this sense, international law in fact never has been. From the days of Grotius to the present time, international law has been conceived of as a body of rules that affects all nations equally. The underlying requirement of equality—the idea that each nation's legal entitlements are the same as any other nation's—operates as a constraint upon the content of the rules.

However, the principle of equality does not itself yield rules of international law. It operates rather as a negative: a purported rule that is not equal in its applicability to nations is thus not a rule of international law. But that does not tell us what are the rules of international law.


5 The UN Charter, art. 2, para. 1, reaffirms the sovereign equality of nations.

6 One nation cannot test nuclear weapons on the high seas without implicitly acknowledging the right of other nations to engage in similar testing (so long as conditions are indeed similar); thus a rule of "no tests" may be preferable to a rule of "tests open to everyone." Note that the rule of "no tests" is itself of general and equal applicability.
NATURE OF CUSTOMARY INTERNATIONAL LAW

Legal systems produce rules in one of two ways: either by legislation or by inferring the rules from practice. The latter is termed in domestic law the "common-law approach" and in international law it is the operation of "custom." I want to suggest that the difference between legislation and custom is more profound than the mere difference between the instrumentalities involved (the legislature and the judiciary, to take the common-law instrumentalities). The real difference is grounded in our fundamental attitudes toward what law is.

A legislature can pass any law irrespective of the laws passed by previous legislatures. Thus a legislature need not concern itself with the legal context in which it passes new laws. Any inconsistency is simply resolved in favor of the new laws.

The common-law system exhibits qualities that legislation lacks. Most importantly, it is logically coherent. Any new rule has to "fit" with the old ones. A new case has to follow precedent. If a new case overrules precedent, it is because there is a more

7 See, e.g., Statute of International Court of Justice, art. 38 (b), which refers to "international custom, as evidence of a general practice accepted as law." General custom applies to all states equally. Special custom is quite different; it refers to rights one state claims to have acquired over another state, such as territorial rights, and thus depends upon a showing of the latter's consent. The consent can be demonstrated by a showing of opinio juris. See D'Amato, The Concept of Special Custom in International Law, 63 Am. J. Int'l L. 211 (1969).

General custom does not require a showing of opinio juris as such; nor does it require any predetermined duration, generality, acceptability, or absence of protest. Writers who have focused on these "requirements" have lost sight of the fact that, even without them, a customary rule can be demonstrated. The bottom-line requirements for custom are (a) an interaction of two or more states (e.g., a resolution of a dispute between them, the signing of a treaty, the acceptance by one of the practice of the other), and (b) an articulation that the generalization we infer from that interaction is or should be a rule of international law. For details and justification, see A. D'Amato, The Concept of Custom in International Law 47-102 (1971).
logical connection between the new case and the previous law than the overruled case had. Thus the new case "corrects" the overruled case, which is now seen to be deviant. Judges see it as their duty to square the rule of decision in the present case with the underlying received rules of common law. In the common-law system, the attitude is that there is an existing body of coherent law, and it is the task of the judge to find it and apply it to each case.

There is one more observation I want to make about the common-law system before turning to international law. The idea of common law is very close to the idea of natural law. Rules must be induced from the successful interactions of real persons (or real nations) in society (in international society). We have therefore a blend of deduction and induction in the natural-law process. This is the same blend that exists in the operations of the common law.

We can only find out what is practical by seeing what people do in practice. We then induce the rules from their behavior.8 We cannot take as our data everything that people do in practice, however, for then we would be hopelessly confusing the normal and the deviant, the reasonable and the unreasonable, the legal and the illegal.9

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8 This is what Lord Mansfield did when he discovered the rules of the "law merchant." Although he articulated them for the first time, these rules were inherent in the customary practices of the mercantile trade.

9 In our measurements of the perturbations of the planets, we do not include the measure of a child using a two-dollar telescope; that would be unreasonable. In our measurement of mercantile practices, we do not include the people who violate, and are generally known to have violated, the terms of a bill of lading. In international law, if we had only one instance in history of a "humanitarian intervention," we might say that that was simply an illegal use of transboundary military force. Only when instances begin to proliferate may it be argued (without necessarily concluding) that there is a rule allowing humanitarian intervention that constitutes a legal exception to the prohibition on the use of transboundary military force. This exception, if it exists, as well as any other exception or refinement of existing rules, must nevertheless make sense; it must be "reasonable." It must cohere logically with the other existing rules; it cannot be an ad hoc deviation.
Let us now consider international society. The most striking fact about the international legal system is that there is no legislative mode of lawmaking. International law has its roots in an older system, one akin to the common law. To understand international law, and to discover its norms, we must put out of our minds the idea of law as legislation. Instead we must look for those regularities in the behavior of states that imply underlying norms of mutual accommodation. The paradigm I have been leading up to can now be stated simply: From the behavioral interaction of states we infer what the underlying rules of international law really are.

THE LAW OF THE SEA NEGOTIATIONS

"Finding" Customary Law

Let me now suggest how this paradigm might be applied to the Law of the Sea Conference and to the Convention.

There is nothing to stop representatives of states, meeting in a multilateral conference, from adopting a "legislative" mode. For example, a representative might say that his government would be in favor of the conference adopting a 300-mile territorial sea. He may attempt various lobbying efforts on behalf of this preferred rule, offering to trade votes on other rules in order to achieve his

10 Although the United Nations counts as its members most of the nations in the world, the resolutions of its General Assembly are not legally binding. Even to refer to them as quasi-legislative is misleading, unless one underlines the quasi and not the legislative.

11 When we look at behavior to discover the underlying norms that are implicit in that behavior, we are postulating the reality of law in the same sense that a scientist postulates the reality of the mass of Jupiter when looking at the perturbations of the other planets. It is our task as observers to discover, to infer, these legal norms. Each observation of an international interaction gives us a measure of the underlying norm. As we add more observations, we get an increasingly clear sense of the underlying customary law, just as different measurements of the behavior of planets and satellites in the aggregate give a close approximation of the real calculated mass of Jupiter.
desired territorial sea. We should examine carefully the context of his remarks, the reaction of other participants, and any related materials bearing on his proposition. Our examination should be conducted with a view toward determining whether the proffered 300-mile rule is advanced as new legislation for the international community, or whether it is put forth as a simple restatement of the underlying customary rule.

In this particular hypothetical case, I am sure that an examination of the remarks of this delegate in their context would reveal that he desires new legislation that would extend the territorial sea beyond that which is generally accepted as customary in international law. If that is indeed our conclusion, then we can give no weight to the remark about the 300-mile territorial sea as such in attempting to infer what the real rule of international law is in that regard. The delegate's legislative preference would be like a child's two-dollar telescope in measuring the mass of Jupiter. If, however, the records of a conference session indicate agreement as to the description of a generally accepted customary rule of law, then that description becomes very important as evidence of the customary rule. If, for example, the conferees agree that customary international law requires free navigation through international straits, then the record of that agreement in that conference constitutes evidence of such an international rule of customary law. The conferees might define an international strait in a certain way, and even if this definition does not exactly accord with what an observer might have said was the underlying customary-law definition, it becomes evidence of the underlying customary law by virtue of the conferees' acceptance of their own definition.13

12 Although we can give no weight to the remark as such, we need not dismiss it as irrelevant. For at least it subsumes acknowledgment of a lesser territorial sea. A nation that wants a 300-mile territorial sea implicitly acknowledges the legality of a breadth of less than 300 miles, in contrast to the nation that desires a 3-mile limit, which implicitly disavows any greater width than 3 miles.

13 The same might be true of a common-law judge basing a judicial decision on custom. The decision itself becomes in future cases the "best evidence" of that custom.
The several lengthy multinational conferences leading to the Law of the Sea Convention thus constitute a wealth of potential evidence concerning customary law of general applicability. In each case, the scholar should examine the proffered positions of the delegates in the context in which they were advanced. We must determine whether the conferees were restating a rule ("finding" it) or whether they were lobbying for new legislation ("making" new rules). On those occasions where the conferees were "finding" the rule, we have evidence applicable to all states (not just the conferees) of the content of that rule.

The Impact of New Treaty Rules on Customary Law

What about the new legislative-type rules that have become incorporated into the Convention? These rules have an impact upon customary law but not because of their status during the conference. Rather, they have an impact upon customary law because of their status in a multilateral convention.

What is that impact? I have tried to spell out the impact of treaties upon customary law in a book published in 1971,14 and in a recent article that updates the arguments and addresses the criticisms of Dr. Michael Akehurst,15 To simplify my position, suppose that state A wants to extend its territorial sea from 3 miles to 12 miles and issues a proclamation to that effect. Suppose state B challenges that proclamation by sending fishing vessels 6 miles off the coast of A. Assume further that A intercepts those vessels and confiscates their catch. Diplomatic negotiation ensues between A and B, and at the end of the negotiation B decides not to challenge any further A's 12-mile limit.

This series of events can be called the "behavior of states" leading to the inference of a customary rule that tends to support the establishment of a 12-mile territorial limit. We normally look upon such cases as constitutive of customary law applicable to all states, not just to A and B. Indeed, under the paradigm I have suggested in this paper, we find in the diplomatic and subsequent interaction of A and B an implicit rule of accommodation in their external relations that

14 A. D'Amato, The Concept of Custom in International Law 103-166 (1971).

establishes a 12-mile territorial sea. We have "found" an underlying rule by examining the behavioral interaction of A and B.

Now let us suppose instead that A, desirous of a 12-mile limit, enters into a treaty with B that provides for a 12-mile territorial sea. Indeed, A can enter into a multilateral treaty that so provides, with B being one of the parties to the multilateral treaty. Is it plausible to suggest that customary law is not affected, in this second hypothetical case, because a treaty was used as the instrument of accommodation, whereas in the first case, which contained no treaty, customary law was generated? Such a position would denigrate the role of treaties as natural instruments of accommodation among nations. Yet such a position has been taken by the English positivist writers on international law, going back to Oppenheim, who have argued that a treaty cannot affect the underlying customary rule.\(^\text{16}\) By analogizing a treaty to a contract, these writers say that nations by contract cannot change the substance of the underlying law.

I contend that their position is at variance with the process by which international law has developed through the centuries. Most of the current rules of

\(^{16}\) These positivist writers assert that treaties merely establish contractual obligations for the parties and have no effect on the underlying law. W. Hall, International Law 7-8 (A.P. Higgins 8th ed. 1924); L. Oppenheim, International Law (H. Lauterpacht 8th ed. 1955) This view has been reiterated by several British and American scholars. C. Parry, The Sources and Evidences of International Law 29-32 (1965); Baxter, Multilateral Treaties as Evidence of Customary International Law, 41 Brit Y.B. Int'l Law 275, 285 (1965-66); Baxter, Treaties and Custom, 129 Recueil des Cours 31 (1970); Waldock, General Course on Public International Law, 106 Recueil des Cours 3, 84 (1962).

The contract view of treaties has been challenged by Lord McNair and Professor Sohn. They assert that domestic contracts are substantially different from treaties in several respects and that treaties can be important sources for finding evidence of customary law. McNair, The Functions and Differing Legal Character of Treaties, 11 Brit. Y.B. Int'l L. 100 (1930); Sohn, The Many Faces of International Law II, 57 Am J. Int'l L. 868 (1963).

See generally D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1132 (1982).
customary law originated in treaties. A treaty is a clear record of an interaction between two or more states that led to a resolution and accommodation of their positions. There is nothing about a treaty that makes it less a statement of customary accommodation than is behavior without a treaty.

I would argue that the Law of the Sea Convention contains rules of accommodation among the parties that constitute evidence of customary law that is as good as any other evidence. The Convention, as a treaty that generates custom, thus has an impact upon nonsignatory nations. It does not affect nonsignatories as a binding treaty," because a treaty can only bind the parties thereto. But it does affect them in the way suggested by Article 38 of the Vienna Convention of the Law of the Treaties: that the rules contained therein become "binding upon a third State as a customary rule of international law, recognized as such."

If the pedigree of a rule in the Convention is a "legislative" one, it affects customary law as indicated above, but its status is somewhat different from that of another rule in the Convention whose pedigree was "law-finding." The latter type of rule was, after all, already a rule of customary law which was simply reinforced by virtue of its inclusion in the Convention. In contrast, the former was not a rule of customary law (because of its "legislative mode") until it became part of the Convention. Thus, the former rule, embodied in the Convention, may clash with a contrary rule of customary law that exists apart from the Convention. Here we have a clash of "measurements" of the underlying rule, just as two inconsistent cases clash with each other in common law. Whatever the resolution of this clash, clearly this "new" rule is on somewhat shakier ground than the other reinforced rule.

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17 See D'Amato, supra note 16, at 1132.

18 Indeed, in the realm of contracts, Lord Mansfield looked to the content of contracts among merchants as an important source of the rules of the law merchant.


20 I deal with some such conflicts in my book, The Concept of Custom in International Law, supra note 14, at 92-96.
The Requirement of "Generalizability" and the "Package Deal"

Not every provision of a treaty is capable of impacting upon customary international law. Some provisions apply only to the treaty parties, because they cannot be generalized to nonparties. Only those provisions that are generalizable beyond the contours of the treaty have the capacity to affect customary law. Provisions concerning the ratification and entry into force of a treaty are examples of rules that do not generate customary law.

Some supporters of the Law of the Sea Convention have attempted to characterize all of the provisions of that Convention as applicable only to the treaty and its parties.21 This is the so-called "package deal" approach, whereby the legal benefits of the Convention are said to be applicable only to the parties who have also accepted its burdens. What is the status of the package-deal idea in international law?

Clearly the "package deal" itself is not generalizable; it is peculiar to the Convention. By its own terms, it applies only to the Convention and to the parties thereto. This is a trivial point—no one cares about the status of the "package deal" itself—but I make the point to call attention to the underlying mechanism.

Now we move to the question that everyone cares about: What is the legal effect of the "package deal"? Does it mean that only parties to the Convention can claim a 12-mile territorial sea because they have also accepted the burdens of the international regime for deep sea mining?

To answer this substantive question we must recall the "trivial" one—namely, that the "package deal" itself is peculiar to the parties to the Convention and is not a customary rule of international law. Because it is not a customary rule, how can it override the customary-law-generating process that treaties generally set in motion? The "package deal" theory attempts to carve out an exception to the law-generating aspect of multilateral conventions by saying that this particular Convention on the Law of the Sea shall not have general law-generating qualities. This stance of exclusivity can be only a wish, a desire, of the parties. It cannot override the general rule of the formation of custom. The rule is the same for every nation in the world and not just for the nations that are parties or are not parties to the Law of the Sea Convention.

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The "package deal" idea, in short, cannot legislate for the international community as a whole. It cannot deny law-generating status to other provisions of the Convention. When those other provisions impact upon general customary law, the impact is felt by all nations, parties as well as nonparties. The parties to the Convention cannot control the effect that the Convention will have upon general international law applicable to third states.

Thus, to sum up what I have said on the status of provisions in the Law of the Sea Convention, the following brief "rules" may be helpful:

1. In order for a provision in the Convention to constitute a "source" of, or "evidence" for, generally applicable customary international law, the provision must be generalizable as a norm of law.
2. Provisions in the Convention that are generally accepted apart from the Convention as expressing rules of customary international law have the highest status. The Convention reinforces these rules.
3. Provisions in the Convention whose pedigree in the Law of the Sea Conference showed the conferees to be in a "law-finding" mode have the next highest status as expressing rules of customary international law.
4. Provisions in the Convention whose pedigree in the Conference was "legislative" in mode also generate customary international law (provided Rule 1 above is satisfied), but these may be challenged by contrary rules emanating from a different source. The more parties that sign the Convention, the stronger will be the status of these rules found in the Convention.
5. None of the above rules is adversely affected by the "package deal" theory.
6. Agreements reached during the Conference that did not lead to treaty provisions nevertheless may furnish evidence of rules of international law if the context in which they were made was the "law-finding" mode.22

22 Professor D'Amato expands on some of these themes and applies them to the Law of the Sea Convention more directly in his comments on pages 170-82 infra.