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Conclusion

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The preceding chapter argued that the term "sources of law" is not a helpful way of conceptualizing the argumentative process by which custom is proved. However, to the extent that the term "source" evokes an image of the Ultimate Decider of the content of international norms, we might say that states taken as a whole are in that position--as creators and subjects of international law. Taking a further step, we can say that by "states as a whole" we mean the consensus of the states. In a loose sense, the "consensus" is the "source" of international law. The trouble with this neat formula, as we found in chapter 2, is that we have no easy way of discovering what that consensus is in particular cases.

To be sure, there are some broadly phrased rules, such as "freedom of the seas" and "sovereignty over airspace" that easily accord with the international consensus. Nor are their applications in all cases difficult; many "core" instances quite clearly come under these rules. However, clear cases, while numerous, do not generally give rise to controversy. The competing claims of states clash in the penumbral areas of law. Does "free seas" mean that a state may freely appropriate a large area of the high seas to its own use for nuclear testing? Does sovereignty over the airspace apply to radio beams to and from orbiting artificial communications satellites when such waves pass through a nation's airspace? On these matters, and indeed on most matters that become a subject of real international controversy, the consensus of states is far from clear. Indeed, the consensus may not even exist; many states may never have concerned themselves with such problems, nor adopted positions with respect to them.

Thus, in most claim-conflict situations, recourse must be had to a different set of argumentative procedures designed to persuade the opponent as to what is in fact the operative rule of international law. Fortunately, a very strong consensus exists on the legitimate argumentative procedures. In other words, all states may not agree that X is a rule of international law, but all or nearly all states agree that procedures A, B, and C are the appropriate forms of argumentation when the validity of the alleged rule X is in question. Following Hart's terminology, the present study has referred to such sets of argumentative procedures as "secondary rules."

One such secondary rule is "custom." It is perhaps the most basic and most important of the secondary rules of international law, for it is applicable generally. Its importance is rooted in the desire of the international community for order and security--aims which are indistinguishable from the meaning of "law." The concept of custom places a high premium upon, and thus derives much of its authoritativeness from, imitation of previous acts by other states. Again, this is very close to the meaning of law, for law succeeds because it establishes regular procedures that do not change with each new application. Further, custom derives much of its authoritativeness from the consent of the states participating in custom-forming acts, the sense that later states may become estopped to act differently, and from the fact that it is "reasonable" for later actions to be justified on the basis of earlier precedential situations.

Looking more specifically into the kinds of arguments used to support a claim that a given rule is a rule of international law by virtue of custom, we have found that international law

knows two kinds of custom: special or particular, and general. The paucity of applications of special custom so far in international relations, and the possibility that there may exist many different kinds of special custom (as many as the particular kinds of situations to which it is applied) make this particular branch of customary law difficult to pursue at the present time. But general custom is different. Here, the rules defining its application are as old as international law itself.

Unfortunately, traditional writings on general custom over-complicate the matter. The notion of *opinio juris*, for example, leads many writers into arcane researches concerning the motivations of states (as if artificial entities could have discernible motivations). And the concept of *usage,* as it is traditionally applied, seems to require a totally undefinable number of repetitions before a line of conduct can be said to generate legal obligation. However, by looking beyond these notions to the original reasons for introducing them into the literature, we are able to find rather simple purposes that could as well be fulfilled by far more parsimonious theories. "Articulation" is a label for one of the latter; it simply means that a line of conduct has been claimed to be a matter of legal regulation and not simply of social habit or political expediency. "Act or commitment" is another, replacing the old concept of usage by a claim-oriented approach that gives more persuasive weight to the repetition of an act, but does not engage in mystical jumps from non-law to law according to the number of repetitions.

These simpler theories might more accurately reflect state practice because of the unlikelihood that international law would have grown and developed according to complicated theories that national decision-makers, their legal counsel, and even the most highly qualified writers could not understand. Moreover, they accord with a relativistic view of law as not a "brooding omnipresence" but rather a matter of individual bargaining advantages in separate claim-conflict situations. The side which has the better case tends to win. A side does not lose simply because it has not attained some standard laid down by writers on international law. Thus, to take account of relative persuasiveness, a claim-oriented approach has been followed which itself results in the simplification of the theory of custom.

Chapter 5, on the relation of treaties to custom, presents perhaps the greatest departure in the present study from the writings of international legal scholars. For this reason, considerable time had to be spent on examples from state practice and judicial decisions, as well as on the theories of writers. The argument that treaties are no different from the other types of acts and articulations making up custom may perhaps appear unnecessarily radical. It might have been more prudent to say that *some* treaties indicate a *tendency* in this direction. However, the evidence does not seem to support such a qualification, and thus it could not be made. Conceivably a lawyer armed with some comprehensive theory of custom, perhaps along the lines suggested in this study, could prevail in a claim-conflict situation by invoking treaties as a generator of custom.

Anyone who writes on a legal subject must wrestle with the tension between the law that is and the law that ought to be. If he simply describes existing law, his undertaking may be redundant, and he may find that a year later the law will have changed in an unexpected direction. For the law that *is* constantly changes, purifies itself, and works in new directions. It has its own sense of purpose. International law in particular is undergoing shifts in direction because of the many new countries now contributing to its content. To take one example from the theme in chapter 5, we may examine the words of Judge Fitzmaurice, that "the idea of treaties as

a formal source of law is particularly attractive to opinion in the newer countries where there sometimes seems to be a feeling that customary international law is a sort of *res inter alios acta*."[1] Whether or not this is the reason why new countries are attracted to treaty law as a source of custom, the overwhelmingly important fact for our purposes is that there is a tendency among the new nations to look to the provisions of treaties for rules of general applicability. Although Judge Fitzmaurice argued strenuously that treaties are not a "formal" source of law, the concession he made in a footnote to the opinion in the newer countries shows his broader tolerance for trends in the law.[2] If the present study is correct in its argument that the tendency to look to treaties as a source of customary law is accelerating and becoming more pronounced, we should hardly overlook this tendency in an attempt to be true to some abstract theoretical considerations (such as the one that analogizes treaties to contracts). In short, a writer is obliged to notice the direction in which the law is going, as well as being aware of its current content. Not to do so is to fail to appreciate Fuller's characterization of law as a purposive activity. If Fuller is right--if this is what law *is*--then the tendencies in law are present facts just as are the particular substantive provisions of rules of law. Scores of new states have come on the international scene in recent years at the same time that the facility of communications and the speed of travel have made the Earth seem small. International law will seem relevant to these states to the extent that its theory and underlying structure make sense.

Footnotes to Chapter 10.

1 Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *Symbolae Versijl* 153, 157 n. 1 (1958).

2 Quite possibly Judge Fitzmaurice penned the opinion of the Court in the North Sea Continental Shelf Cases, judging from the language and style. 1969 I.C.J. Rep. 4. If so, his open-mindedness as to the question of provisions in treaties generating norms of customary international law is well in evidence, as we have seen in chapter 5.