

A Reformulation of the Theory of Custom

Pages 73-102 of the original edition

As we have seen, the traditional theory of *opinio juris* comprehends a conviction on the part of states that their acts are required by, or consistent with, existing international law. Such a theory cannot explain the formation of new customary law, nor can it explain changes in existing customary law. Moreover, the traditional view seems to depend upon exact motivational analysis of state behavior. Yet there is a fundamental difference between what we as observers think a state thinks, and what the state in fact thinks, or feels, or has a conviction about. To add to the difficulty, a state is of course an artificial entity; one can surely ask whether what a state "thinks" is what a majority, or vocal minority, of its leading, or at least influential, decision-makers--or their advisers--say they are thinking.

Nevertheless, we need not abandon the traditional view of *opinio juris* in so far as the *identification* of existing customary law is concerned. Here *opinio juris* is at worst a harmless tautology. For if we can say that a state is acting in accordance with its conviction that it is acting in conformity with prevailing international law, then by implication we *already know* what that international law is. And, if we know the law, then there is no further need to cite the "evidence" of the state's actual practice in conformity with that law.

Yet the concept of *opinio juris* has not endured simply because it reassures us that well-established customary rules are indeed well established. Rather, the concept points to a necessary psychological element in custom creation. As the preceding chapter suggested, its importance arises when states dispute the content of customary law. Well-established rules of custom, almost by definition, are *not* the subject of dispute. Rather, states dispute the content of customary law when one side or the other argues either that a new custom has replaced the old (i.e., a change in the law) or that a new custom has arisen in a previously unregulated situation (i.e., a new rule). These problems get us directly into the matter of custom-formation, an area which the traditional theory of *opinio juris* cannot account for.

The Qualitative Element: Articulation

The simplest objective view of *opinio juris* is a requirement that an objective claim of international legality be *articulated* in advance of, or concurrently with, the act which will constitute the quantitative elements of custom. The idea of articulation has been well stated by Roger Fisher in a different context:

If the United States were to test a missile by firing it directly toward the Soviet Union but so arrange the missile that it would alter course and drop into the sea thirteen miles off the Soviet coast, would this violate any existing rule? So far as I know, neither country; tests its missiles by firing them toward the other, but no rule against it has been mentioned. When the first person, looking at the specific facts on missile testing, articulates the concept of not shooting missiles toward the other country, the rule begins to take life. A significant fact about a rule is the frequency and extent to which the underlying concept is articulated, repeated, and accepted as a valid concept, whether or not it is accepted as a rule to be followed.¹

Of course, Fisher is talking about a political rule—one that might serve some propagandistic policy or strategy—and not necessarily a rule of international law. In the context of international law, McDougal has laid similar stress on the verbal formulation of "world constitutive prescription" and the "promulgative communication of the prescriptive content to the target audience."² Promulgative articulation, according to Lon Fuller, is one of the most basic "inherent" requirements of any system of law-making.³ It is reflected in Article 38 of the Statute of the World Court defining custom as evidence of a general practice "accepted" as law. The articulation of a rule of international law—whether it be a new rule or a departure from and modification of an existing rule—in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law. This voluntaristic aspect of international law is precisely what makes it acceptable to nation-state decision-makers. As we shall see with respect to the Lotus Case, the absence of prior notification that acts or abstentions have legal consequences is an effective barrier to the extrapolation of legal norms from patterns of conduct that are noticed *ex post facto*.

Reduced to its simplest form, the qualitative element of custom is the articulation of a rule of international law. Several components of this formula may be usefully examined with reference to concrete illustrations:

There must be a characterization of "legality." An explicit characterization enables states to distinguish legal actions from social habit, courtesy, comity, moral requirements, political expediency, plain "usage," or any other norm.

Example: Most states do not levy customs duties on articles for the personal use of a diplomatic agent or his family. But this exemption from customs duties is generally regarded as based on comity, not law.⁴ A state would thus be legally free to remove this exemption. Nevertheless, a legal rule could be articulated to the effect that such personal articles are exempt from customs duties. The verbalization might occur in a resolution of the General Assembly or in a convention proposed by the International Law Commission and subsequently ratified. In its draft articles on diplomatic intercourse and immunities, the International Law Commission in fact included such a rule.⁵ However, in its accompanying commentary, the Commission underscored the precatory nature of the article by saying that "it should be accepted as a rule of international law."⁶ The result is a lack of articulation in the sense here discussed—that a given rule *is* a rule of international law.

Inasmuch as personal diplomatic articles are exempt from customs duties by virtue of comity alone—that is, the consensus of states perceives the issue to be one of comity—it would take a change in the consensus to change the rule to an issue of law. A mere contention by one writer or one state that the exemption is legally required would not offset the consensus. However, a single writer or a single state may effectively articulate a new rule of international law in an area that, unlike the exemption from customs duties, is not established as clearly based on comity.

Example: Apartheid is generally conceded to be repugnant to the moral law, the natural law, or the Divine law. But that concession does not make apartheid a violation of international law. As the World Court stated in the South West Africa Case: "Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to

generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a *sufficient expression* in legal form."⁷

Example: Many countries give military aid and economic assistance to other countries. Yet no responsible writer or government official has ever claimed that international law requires the giving of economic aid. Rather, foreign aid is generally conceded to be a matter of political expediency.⁸

Example: Tourists travel nearly everywhere, and nearly all states permit tourism. But we cannot derive from this constant and fairly uniform practice any legal requirement that a country may not in its discretion forbid foreign visitors to enter its borders. Tourism has not been articulated to be a matter of international *law*. It is simply a long-standing practice, perhaps one of comity, courtesy, political expediency, or simply habit.

Of course a practice based on comity or expediency might become a rule of customary law; this is what allegedly occurred in the case of the Paquete Habana.⁹ But a necessary ingredient of change is the articulation of the practice as an issue of international law. Simple repetition is insufficient; all matters of comity do not eventually "harden" into customary law. Repetition, no matter how frequent, cannot transform tourism or the use of French as a primary language in diplomacy into legally binding obligations.

Example: Although manned exploration of other planets has not yet taken place, we know in advance of "usage" or "practice" that exploration, exploitation, and ownership of extra-terrestrial bodies are questions of international *law* and not exclusively of expediency, morality, or comity. For articulation in advance of usage has taken place in a resolution of the General Assembly of December 13, 1963.¹⁰ Though the resolution in terms is future-oriented, it nevertheless makes clear that exploration and use of outer space are matters of international law. The resolution alone does not generate customary international law, but it does provide the element of articulation. If states later behave in a manner consistent with the resolution when exploration and use of outer space become technologically feasible, we may then say that customary law has been established.

The "legality" must be of international, not domestic, law. As Karl Strupp has suggested with respect to the legal consequences of municipal judicial decisions, the decisions must not reflect merely an *opinio juris* in the framework of internal law, but rather an *opinio juris gentium*.¹¹ For without this objective element of internationality, one could not tell whether the rule articulated would pertain to states in their international relations. Judge Nyholm's dissenting opinion in the Lotus Case reflects this concern, in his reference to acts "accomplished in the domain of international relations."¹² One of Judge Hudson's elements of custom, cited in the first chapter, requires the practice to be "with reference to a type of situation falling within the domain of international relations."¹³ Since it is by no means self-evident, as the following examples will show, whether a situation falls within the international or the domestic domain, the rule must be articulated to be one of international law.

Example: A classic international rule says that what a state does to its own nationals within its own territorial boundaries is a matter solely of domestic jurisdiction. Yet some inroads have been made by the Nuremberg decisions and the Genocide Convention, which have articulated the general norm (now starting to have an impact in the human-rights area) that a state must treat even its own nationals in a manner that does not do violence to basic humanitarian

standards.¹⁴ As the World Court held in 1923, "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."¹⁵

An interesting doctrine which has commanded widespread acceptance in international legal writing holds that international law is all-pervasive: it *regulates* a state's conduct in the international sphere while *empowering* a state to act as it pleases in the domestic sphere. The monist conception of international law, stemming from Kantian philosophy and receiving present expression in the theories of Hans Kelsen, holds that all domestic acts derive their ultimate legality from international law.¹⁶ But this position is only an artificial construct. There is no operative, claim-oriented value in the assertion that one legal system allows someone to act or not to act at his discretion. In an artificial sense, the laws of God and of Nature allow men to act of their own free will, but in disputes among men nothing would turn on the basis of these Divine or natural laws. Similarly, we would find artificial a statement that international law empowers a state to build highways or establish post offices, since no one has ever claimed that international law could in some conceivable circumstance restrain a state from doing these things. Unless laws can restrain a person from types of actions, they are not laws that concern him. Nor should this situation be confused with others in which certain types of laws empower someone, in a legal sense, to do certain things. The law of wills empowers an individual to make a last will and testament if he follows certain formalities. No one forces an individual to make a will, but if he desires one that the courts will enforce he must make it in a specified way. Yet this situation is not analogous to the effect of international law upon governments. International law does not lay down preconditions for governmental acts such as the building of highways and post offices or the collection of taxes. A government may perform these acts as it sees fit, irrespective of international law. It is no more empowered by international law to do them than New York State is empowered to license a New York corporation by virtue of the permissiveness of, say, California. International law stops at the edge of the sphere of jurisdiction of domestic law, even though the boundaries of that sphere, as we have seen, may shift according to the kinds of acts that are articulated to be matters of international legal regulation.

In the case of abstentions, the articulation must characterize the abstention as legally required. At every moment of time, any state is *not* acting with respect to innumerable situations. The United States fails to commit aggression against Canada each day of the year.¹⁷ Switzerland refrains from claiming sovereignty over the Atlantic Ocean every minute of every day. Zambia continually fails to send a manned spaceship to the moon to assert Zambian sovereignty there. Belgium does not order its police to arrest all foreign tourists. In the nineteenth century, no state claimed the right to exclusive use of the resources of the continental shelf. Clearly two categories of non-acts are implicit in these examples: acts a state could do but chooses not to do, and acts which a state could not do (or claims it could not realistically make) given the current level of its technology or its geographical position. Only the failure to commit possible acts can have any legal consequence; surely one cannot draw any conclusion from the fact that a state did not do what it was not capable of doing. But even in the class of possible acts, there is still an infinitely large number that are not committed. Within this class, a state's failure to act when it has been given notice, by virtue of a prior or concurrent articulation of a legal rule to the effect that states have a duty to refrain from acting in such circumstances, is the only kind of non-act that can contribute to the formation of customary international law.

Example: In 1927, could a rule of international law barring criminal jurisdiction over foreign seamen involved in a collision with a flag ship on the high seas have been deduced from a few previous criminal prosecutions in such circumstances? The Permanent Court of International Justice in the Lotus Case accepted the relevance of the contention of the French agent that "questions of jurisdiction in collision cases, are but rarely encountered in the practice of criminal courts." But, accepting the quantitative allegation of abstention, the Court went on to hold that the qualitative element was absent. It stated that the rarity of cases merely showed that states "had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having the duty to abstain would it be possible to speak of an international custom."¹⁸ At first glance, this significant passage seems metaphoric; a state is an artificial entity not capable of being "conscious" or "unconscious." Even if we were to substitute for the term "states" the national decision-makers within those states, the task of proving consciousness of a duty would be impossible. First of all, we would have to know which policy-makers decided not to institute criminal proceedings in collision cases. Since the proceedings never took place, how could one track down the various prosecutors and government officials in all the states in the world who in the course of their terms of office had the chance to, but did not, institute criminal prosecutions of foreign seamen? Many of these officials would not be alive; many who were alive might be unreliable witnesses as to their former mental attitudes concerning such cases-if they remember them at all. But even here, we could not rest with the collection of evidence of mental attitudes of officials directly involved, for any state has a policy-making apparatus which approves or disapproves of policy stances at lower levels. We cannot discover whether a given official would have advocated criminal prosecutions of foreign seamen but for the fact that he felt his superior would disapprove. And, if the superior official never had the opportunity to disapprove, we could not tell what his reasons for disapproving would have been had he been given the chance. Moreover, in most states policy is made by committee and not by individuals. If a committee decides in the first, second, or eighth instance to advocate or disavow a policy of instituting criminal proceedings over a foreign seaman involved in a collision with a flag ship, perhaps some members of the committee may have felt that the policy was required under international law and that other members made their decisions on entirely different grounds. We could not determine whether a majority in any of these various policy-making committees felt conscious of any international obligation. In addition, if the international law point was raised at all in the committee deliberations, some members may have changed their minds in the course of the arguments and decided in error that the policy was or was not required by international law, and some might have hidden their reasons if asked by an outsider after the committee meeting why they had voted in favor of the policy or against it. Even diaries and memoirs are notoriously inaccurate as to previous mental attitudes.

However, the passage in the Lotus Case is susceptible of a more objective interpretation. The Court laid stress on whether the states "recognized" themselves as being obliged to abstain under international law. From an objective point of view, we can hardly infer recognition if no one had ever previously *claimed* that states were under an obligation to abstain in these cases. In other words, if no statesman or responsible jurist had ever articulated a legal rule to the effect that states could not exercise criminal jurisdiction in cases involving collision on the high seas between flag ships of different states over seamen of the foreign vessel, then it would be

unpersuasive to argue as a matter of international law that states (that is, their decision-makers) *could* have recognized themselves as being under an obligation to abstain. The fact of their abstention would thus have no legal consequences; they may have abstained for reasons of comity, courtesy, policy, disinterest, or sheer inertia. In the Lotus Case, the French agent could cite no articulation of a legal rule on the point that was promulgated prior to the actual collision between the French and Turkish vessels. In this objective sense, the Court was of course correct in holding that there was no proof that the states recognized themselves under an obligation to abstain.

That the Court itself was not thinking in terms of subjective evidence of the qualitative element is demonstrated on the very next page of the opinion with respect to the matter of protests. The fact that no evidence was adduced that France and Germany had protested in two previous instances of criminal prosecutions against their nationals showed, in the Court's judgment, that they had not tacitly consented to a rule of exclusive jurisdiction of the flag state as contended by the French agent.¹⁹ Here the Court was using the objective evidence—the lack of formal diplomatic protests—to infer a subjective attitude on the part of the states concerned. Although this particular inference is substantively questionable, it nevertheless indicates a technique of proof of custom that is significant.²⁰ For, despite the occasional language that seems to call for subjective evaluation of states' attitudes, the kinds of proof required by the Court were purely objective: in this instance, notes of protest; in the previous instance, by inference, a prior articulation of a legal rule.

The acting or abstaining state must have reason to know of the articulation of the legal rule. There is no need for the acting state itself, through its officials, to have articulated the legal rule. States often do not give official explanations of their conduct, nor should we expect them to do so. A writer on international law, a court, or an international organization may very well provide the qualitative component of custom. But it must be promulgated in a place which nation-state officials or their counsel would have reason to consult. The leading journals in international law, the leading textbooks, reports of legal decisions affecting international law, resolutions of international organizations—all these are likely sources for the articulation of rules. Diplomatic correspondence is similarly a good source; if one state protests the actions of another, the acting state is clearly apprised of the fact that its actions may have legal consequences. At the present stage of the development of international law, the greatest number of articulated rules may be found in treaties, draft conventions of the International Law Commission, and resolutions of the General Assembly of the United Nations. These sources serve to call to the immediate attention of states the rules that are in the process of change, of "progressive development," or in the process of creation (for example, rules relating to outer space).

The standard of "reason to know," often used in domestic law when matters of notice are at issue, is entirely objective. It depends not on the actual mental state of the person receiving the notice, but on whether a reasonable man so situated would have been informed. When applied to states, the "reason to know" standard clearly cannot be given exact content, but must depend on how persuasively one can contend that a state should have been aware that its actions were constitutive of custom. If the applicable rule has been articulated by the General Assembly in one of its resolutions, one can hardly imagine how a state could plead ignorance of its content. On the other hand, if the applicable rule was published in an obscure law journal devoted to domestic law, a state should not be charged with notice of the rule. International law, to reiterate, is a

matter of relative persuasion. Customary law is no different; the side that can produce the better arguments for the existence or nonexistence of a rule of custom will prevail in the legal arena. With respect to the qualitative element of custom, a well-articulated rule is certainly preferable to a poorly articulated one, but no hard-and-fast line can be drawn in advance as to what types of articulation meet the test and what types fail. In the future, hopefully the International Law Commission, acting under its general mandate to make the sources of international law more available to states, will install at the United Nations a data bank which can serve as the definitive repository of all articulations of rules of international law (as well as evidence of state actions and abstentions). Meanwhile, the process of determining when a rule has been "articulated" in the sense used in this chapter will be, like any other element of international law, a matter of reasonable persuasion.

The Quantitative Element: Act or Commitment

A rule of law is immaterial, psychological; it is a directive addressed to the mind of man, not something tangible. In domestic legal systems, these intangible rules flow from legislatures and courts. In the international legal system, lacking a central legislature and where the few tribunals that exist deal with very few cases out of all the claim-conflict situations that arise among nations, there is no authoritative voice to ascertain which of all the articulated norms are in fact rules of international law. Rather, the states themselves take on the function of creating international law. But states rarely agree unanimously as to the rules of international law; consensus generally occurs with respect to rules that were already well-established. However, as we have seen, state practice reflects a consensus with respect to the secondary rule of custom-formation. When a rule is alleged to be a rule of "custom," the person asserting the rule must adduce a qualitative articulation of the rule *and* a quantitative element as well. Without the latter, one could not tell which of the numerous and often contradictory articulated norms were actually embodied in customary law.

The necessity for a quantitative element also assures states that the creation of rules of law is in their exclusive province. Many contradictory rules may be articulated, but a state can only act in one way at one time. The act is concrete and usually unambiguous. Once the act takes place, the previously articulated rule that is consistent with the act takes on life as a rule of customary law, while the previously articulated rules contrary to it remain in the realm of speculation. The state's act is visible, real, and significant; it crystallizes policy and demonstrates which of the many possible rules of law the acting state has decided to manifest. This conjunction of rule and action becomes a powerful precedent for future similar situations; the next state to come along can repeat the act with a certain amount of assurance that it is not violating international law by doing so, and this sense of assurance increases as more states follow the practice. Other states find it increasingly difficult to challenge the practice. In short, the line of practice becomes customary international law.

What is an "act" of a state? In most cases, a state's action is easily recognized. A state sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship, and similarly engages in thousands of acts through its citizens and agents. On the other hand, a claim is not an act. As a matter of daily practice, international law is largely concerned with conflicting international claims. But the claims themselves,

although they may *articulate* a legal norm, cannot constitute the material component of custom. For a state has not done anything when it makes a claim; until it takes enforcement action, the claim has little value as a prediction of what the state will actually do.

Harder to recognize as an "act" is a state's decision not to act in a situation where it could have acted. If states refrain from exercising civil or criminal jurisdiction over foreign diplomats and their families, it is clear that they could have exercised such jurisdiction. The question then is whether the restraint constitutes the material component of customary law. We have seen from the previous section that if a prior rule calling for such restraint has been articulated in the absence of a consensus that the practice is simply one of comity or courtesy, then customary law will have been generated. Another kind of restraint from action often accompanies the positive action of a foreign state. For example, if a state has a right under international law to send up an artificial satellite, other states will have a correlative duty not to shoot it down. If a state sets up a drilling rig in the continental shelf, other states cannot legally destroy the rig or confiscate the oil. When the first Sputnik circled the globe, the non-actions of the states over whose territory the satellite passed were just as significant to the formation of custom as the action of the Soviet Union in sending it up.²¹ When state A does something that affects state B, and state B allows A to do it, then B's noninterference is just as significant for the formation of custom as A's act. For if B had successfully interfered, A would have been unable to complete the act, and thus the quantitative element would not have been perfected.

In addition to ordinary acts and abstentions, a commitment to act should be included in our list of examples of the quantitative element. If a state has made a collateral engagement to act, its promise--whether subsequently kept or broken--can be argued to be the decisive operative element. In domestic law, a person entering into a contract for sale of a house has at that moment committed himself legally to sell the house. If he thereafter refuses to hand over the deed, the law will "order" him to perform either by injunction or by issuing a new valid deed to the purchaser and causing it to be registered. The mere fact that the seller refuses to comply with the transfer of the deed is legally irrelevant. In international law, states have made extensive use of the treaty to lay down requirements for their future actions and restraints. When a state makes a commitment to act under a treaty, the commitment, rather than the subsequent act, is significant in terms of customary law. Of course, repeated violations of a treaty may constitute a treaty abrogation, but short of that it is the "act" of commitment to a treaty, and not the envisioned performance, that is legally decisive. Similarly, if states have agreed to the jurisdiction of the World Court in a particular case, the court's eventual decision is more significant than the compliance or noncompliance of the losing party. All or nearly all states recognize the Corfu Channel Case²² as expressing valid rules of international law despite the fact that Albania never complied with the judgment.

Just as an act should be distinguished from a claim, so too a treaty must be distinguished from a unilateral declaration. If a state proclaims an intent to act, and even if it passes implementing internal legislation, it has made no international commitment to follow through on its statement of intent. Although several South American states have unilaterally declared their exclusive sovereignty over a territorial sea of 200 miles, other states have disregarded these claims. Some writers have given considerable attention to the theory that unilateral declarations can constitute customary law,²³ but they have failed to adduce instances to support their theory. Some purported instances of unilateral declarations prove, upon inspection, to be international

agreements that were simply not put in writing in treaty form.

A more difficult question, insisted upon by many writers, relates to the number of acts (or restraints) necessary to satisfy the material element of custom formation. However, such an inquiry is misleading. There is no metaphysically precise (such as "seventeen repetitions") or vague (such as "in the Court's discretion") answer possible. States simply do not organize their behavior along absolute lines. There is no international "constitution" specifying when acts become law. Rather, states resort to international law in claim-conflict situations. In such instances, counsel for either side will attempt to cite *as many acts as possible*. Thus we may say that persuasiveness in part depends upon the number of precedents. At the very least, the party asserting the existence of a custom must cite *one* instance of an act or restraint that followed the articulation of a rule. It was perhaps with this minimal requirement in mind that several writers have recently come out in favor of the proposition that only one act is necessary to constitute the material element of custom (see chapter 6).

If one act, or failure to act, is cited in support of a customary rule of international law, the citation will carry with it *some* persuasive power. Even so, there may be a significant difference in the threshold of persuasiveness if *two* (or more) acts can be cited instead of one. Two may be significantly more persuasive than one, whereas three (or four or five) may only be marginally more persuasive than two. In the ordinary meaning of the word, "custom" is something that has *repeated* itself. Plucknett cites a thirteenth-century source to the effect that "twice makes a custom."²⁴ Let us examine how this ordinary-language conclusion would apply in some hypothetical conflict-of-custom situations.

Imagine a case of first impression in which none of the states involved has signed any treaty bearing on the subject matter. State A launches an artificial satellite that, after orbiting the earth several times, re-enters the atmosphere, is not consumed by atmospheric friction in its entirety, but instead falls within state B, striking and killing a citizen of B. State B makes a diplomatic request of state A to pay damages to the heirs of the decedent, arguing that international law requires absolute liability in this admittedly accidental situation. State A thereupon pays to B the damages requested, but reserves its position on the question whether it was under an obligation to pay. Now assume that after some time a second case of a falling satellite occurs, the satellite having been launched by state C and causing damage in state D. D represents diplomatically to C that C is liable under international law. When C refuses to pay, D argues as follows: (1) A legal rule was articulated by B in its diplomatic request to A. This articulation occurred *prior* to A's "act," which in this case was A's decision to pay. There was no need for the articulation to occur prior to the accident, since the accident admittedly was out of the control of A. (2) A's decision to pay constituted the material element of the custom. (3) Although there is only a single instance of this custom, one is better than none at all. The A-B act at least stands for the rule contended for by D, whereas C can cite nothing in its favor.

These arguments would appear to be more persuasive than any that C could use. And yet, A-B case. C's refusal to pay is just as much an "act" as A's prior willingness to pay. Therefore, if a future case arises between E and F, F, the plaintiff, will cite the A-B case while E, the defendant in the diplomatic exchange, will cite the C-D case. Since the two cases cited will be opposed to each other, the rule at that point will be indeterminate. From the point of view of E and F, the E-F case will be the same as a case of first impression.

Thus, C's refusal to pay would operate to defeat the A-B custom. Since C knows this, C

may refuse to pay on the basis that its very refusal will cancel the previous rule and thus remove, in effect, whatever legal pressure D was able to muster on the basis of the A-B situation.

D might reply that C's refusal to pay was illegal, and thus C's action could not affect the underlying customary rule established by the A-B case. This position, however, fails to look at the facts from the E-F perspective, which sees C's refusal as equally valid as A's decision to pay. Indeed, the fact that C's refusal to pay came later in time might even make it a more persuasive precedent, from E's point of view, than the A-B case.

But might it not be possible to lay down a rule that the *first* case or first few similar cases generates a customary rule, and that later cases would simply be violations of the customary rule and should be given no legal effect? Although this position does follow from many of the traditional concepts of *opinio juris* discussed in the preceding chapter, it ignores the possibility, and actuality, of *change* in customary law. The only way customary international law can change—and it certainly has changed significantly in the practice of states over the centuries—is by giving legal effect to departures from preceding customary norms. The contrary course would be logically absurd. It would mean, for instance, that once the A-B case was on the books, then even though the next five hundred similar cases each resulted in a refusal to pay damages, the A-S case would be good law and the five hundred subsequent states refusing to pay would all be acting illegally. No one has ever claimed this; all writers would admit that the similar actions of five hundred states would overwhelm the first, quaint case that reached the opposite result. But if five hundred cases can overturn one, so can a single contrary case cancel a previous one.

C would not have been in this position had there been *two* prior instances of the A-B variety. If A had previously paid damages to B, and M had paid damages to N, then in the third case of C vs. D, any refusal by C to pay D would not effectively outweigh the two prior precedents. C's refusal would not become its own justification, and D would clearly have the more persuasive case. In other words, the *repetition* of an act constituting the quantitative element of custom serves to enhance the rule significantly. Two acts are significantly more persuasive than one, since in the third situation there would be no effective way of canceling the rule by acting differently.

It is important to note that resort to the World Court or to any other international tribunal is, in present international relations, a highly atypical event. States normally make many claims based on their view of international law; other states will evaluate those claims and either comply with them in whole or in part, or ignore them.²⁵ Let us nevertheless assume that an international tribunal had jurisdiction over the previous hypothetical cases. In the C-D case when the A-B precedent was the only prior instance, if D brought an action against C in an international court, D would probably prevail on the basis of the arguments suggested for D previously. C could not persuasively argue that his refusal to pay D would constitute a negating precedent for future cases, thus canceling the rule of law, for the court would probably react by *ordering* C to pay, stating that any refusal by C would be illegal and hence of no effect. Yet the court would be justified in reaching this result because C had previously accepted its jurisdiction, thus agreeing to be bound by its judgments. C's "act" of accepting the jurisdiction of the court, therefore, is what might lead to a different result. Of course, C could argue that his freedom to change the customary rule in the absence of a tribunal should not be compromised by the presence of a tribunal. If the court were to accept this argument, it would make no effective difference whether the C-D case were brought before an international tribunal or were handled in the normal

give-and-take of diplomatic bargaining. One can only await with interest such a "case of second impression" in an international tribunal.

Much more assurance can go into a prediction that an international tribunal would decide in favor of D if there had been two precedents (the A-B and M-N cases) in favor of a rule of absolute liability. Conversely, if an international tribunal had to deal with the initial A-B case, it could not justifiably decide the case on the basis of international customary law, assuming that there was no treaty on the subject. The court might find a consensus of all the nations in the world in favor of the rule of absolute liability or its opposite, particularly if the General Assembly had passed a resolution to that effect. Or the court might resort to analogies, "general principles of law," or some other standard for disposing of the case. But it could not persuasively base its decision on custom, since there was no prior custom. However, there may still be some "law" even for the first case that arises, as we shall see in considering states' freedom of action (chapter 6).

Finally, the hypothetical cases just analyzed have important implications for the concept of change of customary law. Customary law can be changed or modified by divergent acts subsequent to the initial establishment of the rule. Even a rule of custom based on two or more situations can be changed. For instance, let us imagine again that the A-B and M-N cases resulting in absolute liability have taken place. In the subsequent C-D conflict, *even though* D now has by far the more persuasive case based on custom, C might nevertheless refuse to pay. Moreover, C might not agree to the jurisdiction of any court to settle the dispute. D might be angry with C's position, but might decide to let the matter drop as being unworthy of risking a serious international incident. If that is the result, then in the next case, E would be in a position to make arguments to F similar to the ones C made to D. E would argue that its own refusal to pay would constitute the second disconfirmatory instance which would then serve to negate the two affirmative precedents.

Many writers have suggested that in assessing custom the acts of a major power have more "weight" than those of a small country.²⁶ This observation, which undoubtedly contains some truth, might be refined by saying that what gives a nation its voice in forming custom is not necessarily its military might or the amount of real estate it possesses, but rather its degree of sophistication in international law. Great Britain, for instance, probably speaks with a greater authority in international law than its military position might warrant, because it takes care to publish its diplomatic correspondence, because many British writers publish in the world's leading international legal journals, because it is capable of making sophisticated, and not simplistic, legal arguments in international diplomacy, and so forth. In any event, if A and B are two small powers and C and D are the United States and the Soviet Union, the C-D act may be more persuasive as a cited precedent than the A-B act if the two acts are different. Similarly, if the C-D act is quite recent whereas the A-B act occurred many years in the past, the more recent act will probably be accorded greater weight in arguments about custom. On the other hand, these tendencies should not be pushed too far. In particular, if a conflict arises between a major power and an underdeveloped newcomer to the international community, the latter may not be convinced that it should accord greater weight to a C-D situation because it involved major powers. The underdeveloped country might very well "associate" with A and B, or it might argue that all states are juridically equal and therefore no state is entitled to a greater legal voice than another despite disparities in size and strength. Thus the persuasiveness of a claim of customary

law depends in part upon the identity of the claimant and respondent. None of these matters can be settled in advance by a writer; everything ultimately depends on what states do in practice.

Unquestionably customary law has changed over the years, and thus any theory must incorporate the possibility of change into its concept of custom. In particular, an "illegal" act by a state contains the seeds of a new legality. When a state violates an existing rule of customary international law, it undoubtedly is "guilty" of an illegal act, but the illegal act itself becomes a disconfirmatory instance of the underlying rule. The next state will find it somewhat easier to disobey the rule, until eventually a new line of conduct will replace the original rule by a new rule. The number of disconfirmatory acts required to replace the original rule is a function partly of the number of acts that established the original rule in the first place, the remoteness in time of the establishing acts, the legal authoritativeness of the participating states, and other possible factors, including the argumentative skill of the proponent or opponent of a claim of custom. At any rate, the theory that has been suggested here allows for the smooth working of change in customary international law. Each deviation contains the seeds of a new rule. Under the classical theory, change was impossible because each deviation was illegal, and hence there could be no *opinio juris*. The present theory, necessitated by the fact of change, has attempted to show how change is theoretically possible.

The Role of Protest

A number of scholars, especially in recent years, have made various claims pertaining to the role of protest in the formation or modification of customary international law.²⁷ Writers like MacGibbon and Wolfke have made the extreme claim that when one state does not protest the actions of another state, the first state may be presumed to have accepted the other's actions, and that this acceptance amounts to a presumption of *opinio juris* sufficient to form customary law.²⁸ Many writers will cite an absence of protest as somehow indicative of a legal act,²⁹ but no example from state practice has been found of protests by one or more states operating to prove the illegality of an act. This lack of "negative evidence" is indeed significant, as it casts doubt on all the theories that purport to assign to diplomatic protests a constitutive role in the formation of international custom.³⁰

Although it would indeed be convenient to be able to say that everything states do that goes by unprotested by other states must be legal, most states most of the time clearly do not issue notes of protest to the actions of other states that they regard as illegal under international law. Foreign offices which did so would have little time for anything else.³¹ To be sure, a country's entire diplomatic apparatus is geared to bringing pressure upon other states, often for acts contemplated by the other states that may be illegal, but sometimes also to dissuade other states from perfectly legal policies that nevertheless conflict with the political interests of the diplomat's state. This diplomacy is usually conducted verbally by ambassadors, representatives, consuls, visiting businessmen, and so forth. The range of negotiating tactics is quite vast, including threats to confiscate the assets of the other country's nationals that are located in the complaining state, retaliate by raising tariff barriers, reduce foreign economic or military aid to the target state or its allies or dependents, support another country's hostility toward the target state, vote against the target state in the United Nations, and related threats and warnings.³² Or, inducements can be offered if the target state will withdraw its contemplated policy: stepped-up foreign aid, sympathetic voting in the United Nations, and so forth. If these measures fail, a

diplomatic note protesting the other state's action might be issued. But the protest would signify a failure of diplomacy. Moreover, it might only serve to worsen relations between the acting state and the protesting state. On the other hand, sometimes states issue notes of protest that they undercut by verbal diplomacy, simply to serve as propaganda that the state is doing all that it can to protect its citizens or businessmen. Similarly, a state may issue notes of protest to cover up demands that it take forcible action, such as the American protests against British naval infringements of American neutrality between 1915 and 1917 when Germany was demanding that the United States use military force to protect its vessels from British searches and seizures.

One can hardly discern in all these uses and misuses of protest any hint that a failure to protest means that a state has acquiesced in the legality of another state's actual or contemplated policies. And even so, the examples given concern cases where a state is directly affected by actions of another state and *might* resort to protest if it felt that protest was useful. Far more numerous in terms of creating customary law are the cases of states not directly affected by the actions of other states. If states A and B engage in an act that may have repercussions in customary international law, states C through Z will hardly ever interfere by issuing notes of protest in a matter that does not directly concern them.³³ Yet states C through Z will be affected by the customary international law "precedent" that may be created by the A-B act. Of course, this situation would appear intolerable unless states C through Z had an opportunity to change the A-B rule if they did not like it. This again points up the importance of allowing for *change* in customary law, which neither the classic *opinio juris* theories nor the theories about protest have satisfactorily done. *If* opportunities exist to change customary law, then states need not concern themselves too much with protests. *Since* states do not often issue notes of protest, and hardly ever do so when they are not directly concerned, it follows that a relatively easy way exists for states to change customary law. One way, which has already been discussed, is simply to act contrary to the norm and hope that the directly affected foreign state acquiesces or at least does not complain too loudly. Another far more secure and simple way, which will be explored in the next chapter, is to sign a treaty.

If one cannot persuasively argue that failure to protest constitutes acceptance, acquiescence, or *opinio juris* to the effect that the acting state is behaving legally, might the contrary to some extent be true? When state A protests the act of state B, state A is effectively calling attention to the legal consequences of B's act (A claiming that the act is illegal; B, by implication, replying that the act is legal). The effect of the protest may be to articulate a legal norm with respect to B's act. If B claims that its act is legal, and then continues to act in the same way, its conduct will constitute the beginning of an international custom. Thus, from A's point of view, the protest not only does not undo what has already been done, but it supplies a qualitative element to the act. It would be far wiser for A to attempt to dissuade B from doing the act by diplomatic means, but if this is unsuccessful, to simply ignore B's act. Then A might later be able to claim that B's act was a "political" one that had nothing to do with international law. Perhaps many states have often refrained from issuing notes of protest to other states on matters of international law in part because they did not want to call attention to the action and to the invite the other states, if they were stubborn, to continue to act in the teeth of protests and thus set up a well-noticed line of conduct that could be cited in the future as having precedential value for customary law.³⁴

Footnotes Chapter 4

1. Fisher, "Constructing Rules that Affect Governments," *Preventing World War III: Some Proposals* 342, 348 (Wright, Evan, & Deutsch eds. 1962).
2. For the text, see 3 GATT, *Basic Instruments and Selected Documents* (1958).
3. Fuller, *The Morality of Law* 49-51 (1964).
4. See, e.g., Tunkin, "Remarks on the Juridical Nature of Customary Norms of International Law," 49 Cal. L. Rev. 419, 430 (1961).
5. Int'l L. Comm'n, *Draft Articles*, 53 *A.J.I.L.* 179, 196 (1958) (art. 27); adopted Vienna Conv., 55 *id.* 1064.
6. 53 *A.J.I.L.* 197 (1958).
7. 1966 I.C.J. Rep. 6, 34. (*Italics added.*)
8. A strong articulation of political expediency may serve to obliterate a weaker allegation of legality. In the Asylum Case, albeit a case of special custom, the World Court refused to deduce customary law from a practice that "has been so much influenced by considerations of political expediency." 1950 I.C.J. Rep. 266, 277.
9. 175 U.S. 677, 694 (1900). Justice Gray's opinion in this famous case contains ample evidence of a well-settled rule of customary law; the idea of "comity" growing in the period of 100 years into a rule of custom was introduced solely to help further distinguish dicta in an old British case.
10. G.A. Res. 1962 (XVIII). A quite different impact on customary law may now obtain with respect to the multilateral convention on outer space, signed at Washington, London, and Moscow on January 27, 1967.
11. Strupp, "Les regles generales du droit de la paix," 47 *Recueil des Cours* 263, 307 (1934).
12. P.C.I.J. Ser. A, No. 10, at 4, 59 (1927).
13. 2 Int'l Law Comm'n, *Yearbook* 26 (1950).
14. States may now be required to treat their own nationals "according to the laws of 'humanity.'" Whitaker, *Politics and Power* 419 (1964).
15. Nationality Decrees Issued in Tunis and Morocco, P.C.I.J. Ser. B, No. 4, at 24 (1923).
16. Kelsen, *Principles of International Law* 290-94, 307-43 (2d ed. Tucker 1966); see Bishop, "General Course of Public International Law, 1965," 115 *Recueil des Cours* 151, 191-92.
17. See Henkin, *How Nations Behave* 43 (1968).
18. P.C.I.J. Ser. A., No. 10 at 4, 28 (1927).
19. *Id.* at 29.
20. The inference seems to be in error; one might equally well infer that states usually refrained because of the effectiveness of *threats* of protests (delivered orally). In the two cases where jurisdiction was asserted, actual notes protesting the jurisdiction might have been deemed futile as occurring after the event.

As Judge Altamira pointedly said in his dissenting opinion, governments resort to protests in such cases "only when things have developed into a public scandal." Otherwise, either "indolence" or "anxiety to avoid diplomatic complications" keep them from protesting. *Id.* at 98. One should not readily conclude from failure to protest that a state necessarily feels that what the acting state is doing is legal under international law.

21. Assuming that the states had the technological capacity, then or later, to interfere with the satellite's flight. They might also have threatened to retaliate in some other way against the Soviet Union unless she ceased to launch Sputniks. Simple protest, standing alone would have

articulated the act.

22. 1949 I.C.J. Rep. 4.

23. E.g., Suy, *Les actes juridiques unilatéraux en droit international public* (1962), and citations therein.

24. Plucknett, *A Concise History of the Common Law* 308 n. 1 (5th ed. 1956), citing P. de Fontaines, *Conseil d'un ami* 492 (c. 1259).

25. For the now classic statement of this process, which however uses the term "customary law" with considerable vagueness, see McDougal *et al.*, *Studies in World Public Order* 773-74 (1960).

26. DeVisscher, *Theory and Reality in Public International Law* (1957); Bishop, *op. cit. supra* n. 16, at 227.

27. E.g., Lauterpacht, "Sovereignty Over Submarine Areas," 27 *B.Y.I.L.* 376 (1950); MacGibbon, "Some Observations on the Part of Protest in International Law," 29 *B.Y.I.L.* 293 (1953);

Wolfke, *Custom in Present International Law* 50-57 (1964).

28 MacGibbon, "Customary International Law and Acquiescence," 33 *B.Y.I.L.* 115, 131 (1957);

Wolfke, *op. cit. supra* n. 27, at 157-65. On p. 60, Wolfke writes: "An international custom comes into being when a certain practice becomes sufficiently ripe to justify the presumption that it has been accepted by States as an expression of law." However, ten pages later, he adds: "Since acceptance as expression of law is only presumed, one cannot speak of how it comes about." This line of reasoning, similar to that used by many writers in discussing *opinio juris*, obviously ends in a blind alley. The present study has attempted not to continue the exploration of the blind alley, but to reexamine the questions leading to it.

29. E.g., Lauterpacht, *op. cit. supra* n. 27; McDougal, *op. cit. supra* n. 25, at 763-72

30. Not at issue here are cases relating to the acquisitive prescription of territory or "servitudes," for in such cases protest is a material element in defending title. Protests are the rule in these classes of cases, not the exception. In a different category of cases, those relating to "special custom," protest is important (see chapter 8).

31. There is very little mention of the function of issuing diplomatic notes of protest in a detailed study of the various functions of the office of the Legal Adviser to the Department of State. See Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," 56 *A.J.I.L.* 633 (1962).

32. See Iklé, *How Nations Negotiate* (1964).

33. One example has been found by Lauterpacht, *op. cit. supra* n. 27, at 397 n.2: the fact that Germany, Austria, and France protested against the seizure of Messrs. Mason and Slidell from the *Trent* during the American Civil War. Such examples are extremely rare, and in any event are open to the possibility that the directly affected country simply asked several of its friends or allies to join in the protests in order to add to the diplomatic pressure or to dramatize the issue. customary law.

34. In the hypothetical case where one state's act is protested by all or nearly all the other states, the generality of protest may amount to a consensus as to the right norm, in which case the protest would be effective evidence of international law.