

## Basic Factors

Pages 169-186 in the original edition

### *The Concept of Authoritativeness*

How custom operates as a secondary rule in international law depends in large part on why custom seems invested, in the views of nation-state officials, with a certain degree of authoritativeness. The basic question in this regard has been well put by Carleton Allen: "Why does the thing done become the thing which *must* be done?"<sup>1</sup> Wherein lies the legal force of custom that exerts a felt pressure upon state representatives to behave in a manner similar to the prior acts that constituted the custom?

Unfortunately, these questions invite responses that are seen, upon inspection, to be tautological. For example, positivists insist upon a concept of "validity" that would readily indicate whether a customary rule is a legal rule or simply one of social etiquette, such as Hart's illustration of the custom of men removing their hats in church.<sup>2</sup> But with respect to this concept, Alf Ross has pointed out that "[V]alidity is nothing objective or conceivable, but merely a word used as a common term for such expressions by which certain subjective experiences of impulse are rationalized."<sup>3</sup> To say that a rule is part of the international legal system may be another way of saying that it is a "valid" rule, yet this renders tautological the concept of validity. Of course this line of reasoning puts decisive emphasis upon what nation-state representatives say (or, more properly, manifest) a rule to be: for example, decision-makers may regard it as an international rule that vessels sound a warning horn when in a fog on the high seas, but may regard only as "comity" a rule that vessels should salute each other on the high seas. Yet this verbal distinction constitutes the very definition of international law; international law is "law" because it is regarded as such by the representatives of the nation-states who consider themselves subject to such law.

A similar tautology follows from the use of the term "binding" in place of the term "validity." What makes a given rule "binding" on a state is simply the fact that an international consensus regards the rule as part of the system of international legal rules. The target state might choose to ignore the "binding" character of such a rule, just as anyone may disobey a law, but the rule remains binding in the sense that other states consider it to be so. The decision to disobey it thus would involve the target state in the strategic calculations mentioned previously in chapter 2, calculations which are applicable to all rules in the international legal system.

Many writers have attempted to go beyond expressions such as "valid" or "binding" to see what might distinguish an international rule from international comity. Kelsen has attempted to find a threat of physical force behind all "valid" international rules. But although he found a threat of force behind some rules, other rules only in the most attenuated sense could be said to be backed by force--the force that might be assembled, for instance, if the Security Council managed to pass an implementing resolution. Other writers, noting Kelsen's difficulty with physical force as a sanction, have enlarged the concept of sanction to include community expectations or world public opinion. Yet the more the concept is enlarged, the less useful it becomes as an analytical device, particularly when many political "rules" or norms of social etiquette are also "enforced" by community expectations or world public opinion. Finally, nothing bars collective enforcement of policies that are by international law illegal; the majority of nations might "gang up" on a single state that is engaging in a morally reprehensible practice that the majority concedes is nevertheless perfectly legal. To equate legality with the application of sanctions would be to make collective

security as illogical as the old concept of "just wars," which apparently defined the legal transgressor as the country which happened to lose.

However, if we abandon concepts such as "valid" and "binding," and cease to look for simple indicators (other than the use of legal "principles, concepts, and methods"<sup>4</sup> such as "sanctions," we may find that there is a useful sense to be derived from the psychological notions of authoritativeness, bindingness, or "feeling of validity." These ideas may point the way to an inquiry into international law in general, or custom in particular, that emphasizes why nation-state representatives are usually willing to concede that rules among nations are "legal" and "authentic." In such an inquiry, as in any investigation into opinions and attitudes, we must adopt a multifactoral approach and be willing, in addition, to concede the likelihood that transference can take place.<sup>5</sup> For example, "sanctions," both in the sense of a threat of force or in a broader sense as the threat of hostile world public opinion, may indeed constitute a factor behind the authoritativeness of some of the rules of international law; this threat sometimes becomes associated with, and reinforces, the sanctions behind other rules (which, by themselves, might be unenforceable). There are other reinforcements as well--morality, reasonableness, fairness, degree of articulation--that may help account for the authoritativeness of rules that are called rules of international law. Since these latter factors present no special problems, they need only be mentioned for the sake of completeness. This Part deals with the particular factors that help to account for the authoritativeness of custom and may throw light upon its nature and interpretation.

#### *Factors of Initiative and Imitation*

Carleton Allen has properly drawn attention to the importance of imitation in the notion of custom, but his insistence on the idea that man is a creature of habit does not satisfactorily explain the force of imitation.<sup>6</sup> For much of man's behavior is nonhabitual, and in any event the idea of "habit" seems to bear the same relation to "custom" as does the idea of "binding" to "law"--a restatement rather than an explanation. A different explanation of custom, subject to the same infirmity, was propounded by the German historical jurists, including Puchta and Savigny: custom is binding because it is the corporate expression of the soul of the people.<sup>7</sup> Even if we modified this to read that custom is binding because it expresses the international consensus, the statement would be more of a conclusion than an explanation.

A more fruitful approach might consist in focusing upon the desires of states vis-à-vis each other and the international environment. One feature has been rightfully insisted upon by Clive Parry in his discussion of custom in international law: there are so few states involved that their international actions are invested with considerable significance.<sup>8</sup> International law deals with roughly 130 states, whereas a municipal legal system might number its subjects in the hundred millions. Secondly we might view the "state of nature" of international relations as not one of peace, as Pufendorf would have it, nor of war, as in the theories of Rousseau, but rather of "troubled peace" like that depicted by Montesquieu and Hobbes.<sup>9</sup> McDougal argues that for analytical purposes one should focus upon a "continuum of degrees in coercive practices" rather than the two extremes of "pure" peace or "total" war.<sup>10</sup> Third, international relations are obviously *sui generis*; nations cannot readily count upon direct analogies from domestic law or politics to help them solve international disputes. The international laws of piracy, freedom of the high seas, adjacent state ownership, and control over the continental shelf are not immediately comparable to domestic legislation. Therefore, given these three perspectives, one may reasonably expect nation-state officials to accord considerable value as "precedent" to acts of other states in the international arena. If state A acts with respect to state B (for example in assuming jurisdiction

over a collision of the vessels of A and B), and state B does not effectively prevent A's act, the A-B "case" tends to be viewed by the other states as an accommodation in the international system deserving of imitation. The precedent value of the A-B act lies primarily in the fact that it succeeded. If in another situation state C attempted to act vis-à-vis state D (perhaps by flying through D's airspace without permission), and if state D effectively prevented the attempted overflight either by forcing the plane to land, shooting it down, or successfully suing for damages in an international tribunal, then the C-D "act" was never consummated, although a contrary "precedent" may very well have been established (that D has a right to block overflights by C).

In the international system having no preexisting law and no central legislature, states will attach considerable weight to the prior acts of other states. However, for the prior acts to assume real significance in international law, they must have been articulated to be legally significant when undertaken, as we have seen previously. Surely if states themselves are the creators of international law, then we may reasonably expect them to characterize acts as having or not having legal consequences. Thus, for example, if state E has a dispute with state F over whether English or French should be the official language at the next summit conference, the outcome of this dispute would probably have no precedential significance for international law because neither E nor F nor the other states would have claimed that the dispute was legally cognizable.

Whenever a single act between two or more states is characterized by the participants or by the observers as falling within the realm of legal argumentation or discourse, that act acquires considerable precedential force. The second time any two states find themselves in the position to act or not act in a similar manner, undoubtedly one of them will cite the prior act as legal justification for its position. Of course, if the prior act is effectively cited and imitated, much greater strength and weight will be attached to the now reinforced precedent. For any state citing the precedents will be able to claim that they constituted effective prior resolutions of international claim-conflict situations, and that a departure therefrom might lead to international instability and the frustration of reasonable expectations of continuity and fairness.

The force of even a single precedent is magnified in the nuclear age, where one of the most important functions of international law may very well have become the determination of which state is the innovator and which is the maintainer of the status quo in any given claim-conflict situation. The threat of nuclear attack or retaliation, and the potentiality of escalation if an attack is started, underscore the significance of any nation's claim to be within its international legal rights. For the burden of justification in international bargaining lies with the innovator; it is up to the innovating state to frame its policies or intentions in a manner that may be acceptable to the opponent state or that may induce that state not to escalate the conflict. But who is the innovator? International law, and particularly international customary law (by virtue of the force of precedent), may in many situations constitute the only authoritative reference for determining which state is departing from the status quo.

The concept of precedent value in an initial act derives additional significance from the idea of law itself. As Fuller has demonstrated, law can exist only if it satisfies certain criteria; it must, among other things, remain constant through time and it must be self-consistent.<sup>11</sup> Of course law may change, but not so sharply or abruptly that the psychological sense of the constancy of law is destroyed. If judges did not write reasoned decisions, for example, but merely flipped a coin for each case to determine whether the plaintiff or defendant would prevail, there would be no "law" in the psychological sense of a felt pressure to conform one's behavior to the legal norms, even though there would be a process of authoritative decision-making (to use McDougal's phrase). The same result might prevail if judges refused to be guided by the decisions in prior cases. For if no discernible, articulated, intelligible pattern of judicial law-making resulted from

the activity of judges, people would not be able to order their lives in a reasonable, stable manner. More than that, vast chaos would ensue as soon as a number of people realized the potentiality for personal gain in such an arbitrary system. People would begin instituting multi-million dollar lawsuits against banks and corporations on flimsy or nonexistent pretexts, since a significant chance would exist that a judge would decide in their favor (or that heads would come up when the judge flipped the coin). Money, property, and all other accoutrements of ownership and stability would be subject to violent upheaval, fortunes being made and broken with each new arbitrary judicial decision. Criminal laws would be subject to erratic enforcement, and frustrated prosecutors might begin accusing a larger number of suspects in order to increase the chances of convictions. In short, "law" in the sense of verbal norms affecting human behavior would cease to exist. Similarly, in the international system, international law would cease to be a factor in bargaining among states if constancy and consistency were too often ignored. Again, in domestic legal systems, experience shows that "bad" precedents have a habit of lasting a very long time in the courts, until "cured" by the legislature. It is sophomoric to attribute the lasting quality of bad precedents to the inability of judges to make fair decisions; rather, judges are reluctant to overthrow even unfortunate precedents because of the disrupting effect upon the stability of community expectations about the rule of law. Internationally, it is particularly difficult to say whether given precedents or rules of law are desirable or undesirable (how do we choose between *aer clausus* and *mare liberum*?), and thus nation-state officials may be satisfied simply if a precedent exists that informs them of the probable expectations of other states as to the legality or illegality of alternative policies. A state does not normally want to behave in a manner that the other states will interpret as hostile; the safest way to act, therefore, is consistently with the behavior of other states in the past. Thus, as judges respect prior judicial decisions, states tend to invest with legality the prior completed acts of other states when those acts were characterized as relevant to international legal disputation.

#### *The Alleged Countervailing Pressure of Freedom of State Action*

If the successful completion of a single international act (involving two or more states), when it is articulated as having legal consequences, operates to create a certain pressure upon states to conform their future actions in light of the initial "precedent," does not this conception appear unduly to restrict the "sovereign" freedom of action that states enjoy in the international arena? Indeed, the position has often been stated that nations enjoy a freedom to do whatever they want unless restrained by a clear rule to the contrary. If this is true, a single prior act involving two or more states would not seem to amount to a clear rule of legal obligation. It is therefore necessary to consider the alleged freedom-of-state-action concept here as a possible countervailing pressure against the force of "precedents," even though more complex difficulties involving the precedential force of a single act exist and must be dealt with later.

The idea of the presumptive freedom of action of states derives largely from certain scholars' interpretations of the decision in the *Lotus Case*.<sup>12</sup> In that case the French representative contended that Turkey, the state that took positive action in prosecuting for criminal negligence the French officer of the watch in a collision on the high seas between a French and Turkish vessel, could only justify its action by citing a rule of international law allowing it to assume jurisdiction over a foreign national. Turkey, on the contrary, contended that it could act whenever its action did not come into conflict with a principle of international law. The Permanent Court of International Justice accepted the Turkish position, holding that "restrictions upon the independence of States" should not be presumed.<sup>13</sup> But although certain scholars, including DeVisscher, have seen in this language and in the more carefully circumscribed language in the

Oder Commission Case<sup>14</sup> a genuine pressure in favor of freedom of action of states, other scholars have raised the question that the issue may be entirely verbal and not substantive. Lauterpacht, for example, argued that the Lotus result was "almost a tautology," since in context it meant simply that when the Court, with the help of its own researches into international law as well as the pleadings of the parties, finds no reason for limiting a state's freedom of action it will not presume such a limitation.<sup>15</sup>

But another way of explaining the Court's language in the Lotus Case might come closer to the goals of functional analysis of international law. The Court may have intended to emphasize not freedom to act but freedom from the necessity of citing a permissive principle of international law whenever a state does act. Such an interpretation would enable states to create new law or to change the old. By definition, an act creating new law or changing the old can not be justified by citing a preexisting principle of international law. Unless the content of international law has not changed at all in the past five thousand years, the Court's reasoning in the Lotus Case is necessary to accommodate the dynamics of law-formation. As the agent for Turkey pointedly argued during the oral hearings of the Lotus Case, "Si les États devaient être tenus à justifier chacun de leurs actes par des règles permissives, la vie des peuples serait réduite à l'inertie et à la stagnation."<sup>16</sup> Of course this does not mean that a state may claim that it may violate existing law for the purpose of changing the law, but rather that in the Lotus context where the Court did not find any international rule prohibiting Turkey's action, Turkey was free to act without the burden of justifying her action according to existing principles of international law. Indeed only in such a situation does the idea of "precedent" attain an operative meaning.

The question of freedom of action was raised in a more subtle form in the debate over the burden of proof in the Anglo-Norwegian Fisheries Case.<sup>17</sup> There were many issues in that case concerning the long-standing dispute between Norway and the United Kingdom over the way in which Norway claimed to measure its internal-waters line, but the issue that "ripened" the controversy into an adjudicable one was Norway's enforcement in 1948 of its earlier decrees relating to its claimed internal waters. Norway forcibly asserted jurisdiction over several English fishing vessels in the waters Norway claimed were territorial, and tried and convicted the fishermen in Norwegian courts. The operative fact, as in the Lotus Case, was the propriety of a state's exercise of criminal jurisdiction over the nationals of another state. And, as in Lotus, the governing principles of international law were not clear. Thus when the disputants exchanged their Memorials, a principal issue became that of assigning the burden of proof to one side or the other on the question of measuring the breadth of Norway's territorial sea. The question of burden of proof seemed to increase in importance in the Reply Brief and Rejoinder, and it was finally described in the oral proceedings as the second vital aspect of the case in the opinion of the Attorney-General of the United Kingdom.

One possible argument was that the burden of proof was on the plaintiff qua plaintiff: Great Britain, by bringing the case, must prove that Norway's method of delimitation was a violation of customary international law. Norway made a half-hearted attempt so to argue in her Rejoinder, but this simple argument was obviously unpersuasive.<sup>18</sup> A second line of argument looked to the substantive question involved; Norway contended that the littoral state had the sovereign freedom of action to delimit its coastline, but the United Kingdom countered this by arguing that the principle of freedom of the seas put the onus of proof on Norway in any attempt to extend its internal waters beyond generally accepted limits. In light of the way the case progressed, and in view of the ultimate opinion by the Court, this second line of argument was a stalemate. Generally it illustrates a basic fact of international law that whenever any state claims a freedom to act, its act is impinging in some way upon the freedom of another state or of the

general body of states. If this were not so-if, for instance, the issue was one arising solely within the domestic jurisdiction of a state-then by definition international law would not be involved. Thus any state's claim of freedom to act will, in some manner, restrict the freedom of action of another state, even though the other state is entitled to claim the same degree of freedom of action. There is no a priori freedom of action.

Nevertheless, given the importance attached by counsel on both sides to the matter of burden of proof, a third line of argument has not surprisingly assumed great significance: the complaining state must bear the burden of proof, just as the complainant in any legal proceeding ordinarily must prove his case. Counsel for Norway argued that the United Kingdom was the complaining state, and would have been even if it had not been formally the plaintiff but rather an equal party in a possible case submitted under a *compromis*.<sup>19</sup> The United Kingdom, with considerable ingenuity, tried to argue that Norway was the complaining state: that it was, in essence, complaining that the United Kingdom refused to recognize the enforceability of the early Norwegian decrees delimiting its coastline. In other words, the 1935 and 1937 Norwegian decrees themselves amounted to a claim in international law, a claim that was subsequently disregarded by the United Kingdom, and now Norway was suing to enforce its early claims (even though, formally, the United Kingdom brought the case before the Court).<sup>20</sup>

When the judgment of the International Court of Justice resulted in a rather thorough victory for all the Norwegian contentions, Sir Gerald Fitzmaurice wrote that the burden of proof was probably the psychologically decisive factor. He sharply criticized the notion of "a presumption in favor of the legality" of action, arguing that if the acting state enjoys this presumption against other states whose freedom is restricted by the former's action, then "the outcome of a great many disputes would depend largely on the accident of which side was plaintiff and which defendant; and a party to a dispute would only have to maneuver itself into the position of defendant (which would in many cases be quite easy) in order to benefit at once."<sup>21</sup> Nevertheless this argument does not stand up against scrutiny. Even if we assume, for purposes of analysis, that Fitzmaurice was right in suggesting that the issue of burden of proof was important in the outcome of the litigation, it is difficult to see how, in the context of the case, the United Kingdom could have maneuvered itself into the position of defendant on the issue of the validity of the Norwegian decrees. As previously stated, the case arose not because of an academic difference of opinion but because the Norwegian authorities exercised jurisdiction over British fishing vessels. As to this issue, the United Kingdom was the complaining state; it was asking the Court to declare that the exercise of jurisdiction was illegal and to rule that Norway had to pay compensation to the United Kingdom for its actions. The position of the parties on this issue, which was the immediate basis for the controversy, would not have changed had the case been submitted to the Court under a *compromis* listing neither of the parties as plaintiff. Nor, indeed, would their position have changed if the United Kingdom had taken forcible reprisals against Norway, with the latter instituting action for compensation for the reprisals, for the reprisals in this sense would have amounted to a separate action (one might think of it as a counterclaim) that would not have affected the basic matter of whether the United Kingdom was entitled to compensation for the Norwegian exercise of jurisdiction.

Is there any way in which the facts could have been changed so that the United Kingdom might have maneuvered itself into the position of defendant? Theoretically, yes; as Waldock contended on behalf of the United Kingdom during the oral proceedings: "The United Kingdom, exercising a restraint which I hope will be considered commendable, did not send fishery protection vessels to protect our trawlers from interference in areas which the United Kingdom believes to be high seas."<sup>22</sup> The scenario that Waldock presumably had in mind was that Norway

would institute a judicial action against the United Kingdom alleging the illegality of such fishery protection vessels in the claimed Norwegian internal waters. In that case, the burden of proving the correctness of the method of delimitation of the internal waters should reasonably fall upon Norway, the plaintiff in the hypothetical case as well as in this particular issue.

However, would Norway have instituted such a proceeding? Certainly, nothing would compel it to do so. A little reflection would have convinced the Norwegian authorities that the United Kingdom could not go on indefinitely providing naval protection to its fishing vessels, for to do so would increase the cost of the fisheries far beyond the expected profit. Thus Norway could have bided its time; it could have adopted a policy of noninterference with protected trawlers coupled with the exercise of jurisdiction over unprotected British trawlers. If all the trawlers were protected, Norway could count on the fact that, after some time, the United Kingdom would tire of supplying naval protection to the fishing boats, and at that point Norway could seize them. Moreover, Norway could estimate that the other nations of the world would probably not come to the aid of the United Kingdom either by supplying their own protection vessels or by condemning Norway's action in the United Nations. The result might be different if Norway's decrees covered acknowledged portions of the high seas and thus constituted a threat to general maritime commerce, but the lack of protest from other states with respect to the 1935 and 1937 Norwegian decrees, which was noted in the Court's judgment, indicated that the United Kingdom was quite alone in her attack upon the legality of the Norwegian method for delimiting the coastal waters.

The point of this mental experiment is to suggest that Professor Waldock's scenario, which would indeed have "maneuvered" the United Kingdom into a defendant's position, would probably not have worked out the way he envisaged. Conceivably that is why the United Kingdom did not attempt actual naval protection for its trawlers, and instead resorted to suggesting the possibility of such protection as an argument in court. More basically, we may have here a good example of the precedential force of customary law: the reason why the burden of proof (the burden of initiation) fell upon the United Kingdom is precisely because of the way the actual events took place. Norway took physical jurisdiction over the trawlers, whereas the United Kingdom objected only in a legal, and not a factual, sense. Although Norway was the smaller power, it was easier and less expensive for her to seize the trawlers than it would have been for the United Kingdom to protect them from seizure. And this calculus in turn suggests that Norway was right and the United Kingdom was wrong with respect to the question of whether these were internal waters or the high seas. Or, putting the matter differently, the "pressure" of the legal "precedent" resulting from Norway's actions may have affected the outcome of the case if, as alleged, the burden of proof was of decisive psychological importance in the argumentation. Generally speaking, certain acts take place in the international arena out of an infinite number of conceptually possible acts because the former reflect the felt needs of all the states in their international relations. Norway enforced her decrees; the United Kingdom retaliated by bringing an action in an international tribunal. But the tribunal refused to upset what had already taken place. In the absence of other precedents on the matter of delimitation of a concededly unique coastline, the Court seemed to accept the "logic" of the events that had taken place and refused to accept Professor Waldock's suggestion that the events just as easily could have been different. In short, although the issue of burden of proof does make a difference, and although we associate it with a certain amount of freedom of state action on the part of the defendant state, we nevertheless see that such freedom of action is necessary if new precedents are to have any customary force. On the other hand, one might easily exaggerate the importance of the burden of proof. The Court in the Fisheries Case did not mention it, and Lauterpacht specifically disputed its importance in

that case. He argued that it is not usually of significance whether a state is called upon to prove that its action is permitted by international law or not prohibited by international law; in either case the question is simply "what is the substantive rule of international law applicable to the dispute."<sup>23</sup>

### Footnotes to Chapter 6

1 Allen, *Law in the Making* 96 (3d ed. 1939).

2 Hart, *The Concept of Law* 122 (1961).

3 Ross, *Towards a Realistic Jurisprudence* 12-13 (1946).

4 Hart, *op. cit. supra* n. 2, at 231.

5 A transference of emotional reasons for obeying some rules to other rules within the system is well evidenced in domestic law. The fact that many rules correspond with popular notions of morality makes it possible to use the law in some instances for moral reform (e.g., desegregation in the United States). Or the physical enforcement of some rules may condition mass observance of other rules even when these other rules have no moral content (e.g., most people obey traffic rules on completely deserted streets).

6 Allen, *op. cit. supra* n. 1, at 97.

7 See Puchta, *Outlines of Jurisprudence as the Science of Right* (Hastie ed. 1887); Savigny, *System des Heutigen Roemischen Rechts* (1840).

8 Parry's statement is worth quoting: "In a community containing as few members as the international community, the difference between introducing a change into the law which is of universal application and merely asserting and establishing for oneself a claim to the benefit of an exception to the existing law, which nevertheless remains unchanged, is not enormous." Parry, *The Sources and Evidences of International Law* 59 (1965).

9 See Pufendorf, *De Jure Naturae et Gentium Libri Octo* 169 (Carnegie trans. 1934); Hobbes, *Leviathan* chs. 13, 17; Hoffmann, *The State of War* 61 (1965) (using the phrase "troubled peace"); see *id.* at 54-87 for discussion of Rousseau, Hobbes, and Montesquieu.

10 McDougal & Feliciano, *Law and Minimum World Public Order* 106 (1961); see Grob, *The Relativity of War and Peace* (1949).

11 Fuller, *The Morality of Law* 65-80 (1964).

12 P.C.I.J. Rep., Ser. A, No. 10, at 4 (1927).

13 *Id.* at 18.

14 DeVisscher, *Theory and Reality in Public International Law* 355 (1957); International Commission of the River Oder, P.C.I.J. Rep., Ser. A, No. 23, at 5, 26 (1929).

15 Lauterpacht, *The Development of International Law by the International Court* 361 (1958).

16 P.C.I.J. Acts and Documents, *The Lotus Case* 115 (1927).

17 1951 I.C.J. Rep. 116.

18 I.C.J., *Pleadings, Oral Arguments, Documents: Fisheries Case*, v. 3, at 282-86 (1951).

19 *Id.*, v. 1, at 457.

20 *Id.*, v. 4, at 395-98.

21 Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 B.Y.I.L. 1, 12 n. 2 (1953).

22 I.C.J., *op. cit. supra* n. 18, v. 4, at 395.

23 Lauterpacht, *op. cit. supra* n. 15, at 365.