

## "Sources" and "Evidences" of Law

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One of the first questions that a student might ask in a course on international law is, "What are the sources of international law?" or, perhaps, "What are the evidences of international law?" Why, then, are these questions considered in the penultimate chapter of the present study, rather than in the first? The reason is that although they refer to the entire subject of the present work, they do so in terms that create more problems and ambiguities than they can possibly solve.

Taking first the term "sources," one only has to look at the numerous definitions that have been advanced from time to time to see the ambiguities involved in this term. Among the definitions put forth in the literature, we might discern no fewer than six planes of discourse. On the first plane, one might think of "sources" of law such as nature, reason, morality, the mind of man, the Deity, the wise elders, and so forth. Second, the source of law may lie in tradition, habit, policy, necessity, or convenience. A third plane would consider sources such as legislation, judicial decisions, treaties, custom, diplomatic correspondence, or the writings of publicists. A fourth interpretation of the term "sources" might refer to the physical items containing the "law," such as books, libraries, microfilms, letters, journals, newspapers, and the like. Fifth, one might argue that the law stems from judges, decision-makers, diplomats, and other "authoritative" personnel. Finally, a psychological refinement of the preceding category would find sources of law in the psychology of judges, the "subjectivities" of decision-makers, or the "shared expectations" of people in a position of power or authority. Various writers have at various times advanced all of these possibilities as the "true" meaning of "sources," with the result that the term necessarily leads to controversy, rather than enlightenment.

A number of writers have attempted to solve the problem of "sources" by breaking down their definition into two types of "source": the "formal" and the "material." In a comparatively recent effort along these lines, Judge Fitzmaurice termed a "formal" source one that is "legal," "direct," "immediate," and "obligatory."<sup>1</sup> On the other hand, a "material" source for him is a source that is "historical," "indirect," "remote," or inspirational. The material sources "go to form the *content* of the law" while the formal sources give that content "its obligatory character as law." Whatever clarification these extensions of the term "sources" may provide is soon obscured by the rest of Judge Fitzmaurice's article, where he argues that treaties are a material but not a formal source, natural law is in some aspects a formal source, and decisions of international tribunals are neither "technically formal" nor "merely material."<sup>2</sup> Brierly, on the other hand, has written that "reason," along with treaties and custom, is a *legal* source of international law.<sup>3</sup> Kaplan and Katzenbach disagree, saying that "little is added by the inclusion of 'reason' as a source of law."<sup>4</sup> H. L. A. Hart would deny custom the category of a "formal" source, since to him "formal" and "material" sources only apply in legal systems containing rules of recognition, which in his view are not found in the international legal system.<sup>5</sup> Surprisingly, some writers, such as Friedmann, find these distinctions perfectly clear. He writes simply that a formal source "indicates the repository of authority" while material sources are "the sum of the substantive rules . . . from which a particular legal norm is nourished."<sup>6</sup>

In light of the difficulties of definition, our troubles would only be extended and ramified if we were to inquire whether custom is a source of international law. The present study has attempted to approach this question from the viewpoint of secondary rules of international law, arguing that custom represents a type of structured legal argument that has recurred in many claim-conflict situations. It is not necessarily a "source" of law, because law is not something that "flows" from a "source"; rather, it is a form of language and argumentation that carries with it a certain amount of persuasiveness when one man or group of men is trying to get another man or group of men to behave in a certain manner. "Law" is a generalization that we apply to these readily identifiable patterns of argumentation. Law does not "come from" a place. In a claim-oriented sense, one might say that a "source" of "law" is any argument used to claim that a given primary rule or norm is in fact a rule of law. Such arguments, when they become structured through countless repetitions, become "secondary rules" in the sense used in this study. Even so, one cannot accurately say that a secondary rule is a "source" of law; this statement would get us into another definitional vortex that would produce meager results in terms of the verbal energy it would consume.

A metaphysical approach to the concept of law can also be detected in the numerous writings that refer to custom or treaties as "evidence" of rules of international law. The assumption in these uses of the term "evidence" is that law, the "brooding omnipresence" of Justice Holmes, exists somehow independently from the evidential data. An example of the confusion generated by the term "evidence" may be found in the following quotations. Percy Corbett wrote in 1925 that "the records or *evidence* of international law are the documents or acts proving the consent of States to its rules. Among such records or *evidence*, treaties and *practice* play an essential part.... Custom is merely that general practice which affords conclusive proof of a rule."<sup>7</sup> Clive Parry has recently commented on this passage: "Professor Corbett says in effect custom merely proves or illustrates--or indeed merely provides evidence that the conduct it reflects is obligatory.... But perhaps I misunderstand Professor Corbett here. Perhaps what he terms *practice* is Oppenheim's custom, and presumably he would concede *practice* to be both source and evidence in his sense."<sup>8</sup> Some of the confusions here stem from the use of the term "evidence" by Corbett in both a physical documents sense and a conceptual sense (the latter when he refers to the "practice" of states). Another complexity arises from the tendency of writers to jump to the conclusion that "evidence" of custom is the material element and what is evidenced is the psychological element of *opinio juris*; this might explain why Parry says that practice may be both source and evidence. In a recent article Bin Cheng carries this reasoning to an extreme, writing that "the role of usage in the establishment of rules of international customary law is purely evidentiary.... Consequently, international customary law has in reality only one constitutive element, the *opinio juris*."<sup>9</sup> In brief, the term "evidence" denotes something that is not essential, that helps us to find the operative factor, but is not necessary in finding it.

Yet a rule of law is not something that exists in the abstract, nor is *opinio juris* something that we can lay our hands upon. Rules of law and states of mind appear *only* as manifestations of conduct; they are generalizations we make when we find recurring patterns of behavior or structured legal arguments. If the term "evidence" must be used, we may say that rules of law are expressed *only* in the "evidence"; if the evidence is truly evidence of the rule of law, then it is an outward expression of the rule itself. Evidence is a necessary, and not a dispensable, component of the rule. But because of the confusions resulting from its use, the term "evidence," along with

the term "sources," is best relegated to the domain of counterproductive terminology.

### Footnotes to Chapter 9

1 Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *Symbolae Verzijl* 153 (1958). Salmond was one of the first to popularize the distinction. See Salmond, *Jurisprudence* 193 (9th ed. 1937).

2 Fitzmaurice, *op. cit. supra* n. 1, at 153-54.

3 Brierly, *The Law of Nations* 66-68 (6th ed. 1963).

4 Kaplan & Katzenbach, *The Political Foundations of International Law* 263 (1961).

5 Hart, *The Concept of Law* 246 (1961); see D'Amato, "The Neo-Positivist Concept of International Law," 59 *A.J.I.L.* 321 (1965).

6 Friedmann, "The uses of 'General Principles' in the Development of International Law," 57 *A.J.I.L.* 279 n. 2 (1963). Similarly unfruitful appears Professor Hart's suggested distinction between "permissive" and "mandatory" sources of law. Hart, *op. cit. supra* n. 5, at 247.

7 Corbett, "The Consent of States and the sources of the Law of Nations," 6 *B.Y.I.L.* 20, 30 (1925).

8 Parry, *The Sources and Evidences of International Law* 4 (1965).

9 Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?" 5 *Indian J. Int'l L.* 23, 36 (1965).