

Introduction

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The Need for a Theory of Custom

The legal system in any modern industrialized state is characterized by rules of considerable specificity emanating from courts, legislatures, and executive or administrative agencies. But when we focus on present-day international relations, we find a glaring absence of law-creating agencies in the international legal network. There is no central court of compulsory jurisdiction and no vertical system of lesser courts; hence what in state systems is called "common law" is nonexistent. Although the International Court of Justice sitting at The Hague and its predecessor the Permanent Court of International Justice (both to be referred to in this study as the "World Court") have attempted some initial steps toward an international common law, their docket has been noticeably uncrowded. Moreover, in international law there is no central world legislature to issue comprehensive statutes regulating international affairs. Resolutions of the United Nations General Assembly and Security Council may seem to be a form of quasi-legislation,¹ but even here the "statutes" are few and far between and are usually not recognized as "binding" by states that cast their votes against the adoption of a particular resolution. Similar considerations apply to the various administrative or "specialized" agencies of the United Nations.² Where, then, does international law come from?

The primary "sources" (and here this term is used with caution) of international law, as any textbook on the subject will report, are custom and treaty. The latter is, of course, increasingly significant as states find it in their self-interest to make explicit agreements with other states for their mutual benefit and to avoid future conflicts. But of the two, perhaps custom is the more important, for it is generally regarded as having universal application, whether or not any given state participated in its formation or later "consented" to it. Thus, we are likely to find in actual disputes between states, or in potential disputes or claim-conflict situations, that legal argumentation tends to be based upon "custom" because there *was* no treaty or agreement covering the situation. In other words, since states by and large tend to respect their treaty obligations, clashes tend to come in the areas where terms of agreement could not be hammered out in advance. And, even when the disputes are covered by treaties, the contesting states typically have different conceptions of what the words of the treaty entail. In such situations also, there is resort to customary law—the customary law of treaty-interpretation.

Yet despite its central importance to the theory and practice of international law, the concept of custom has not been subjected to satisfactory intensive analysis. Most of the literature on custom is repetitive and involuted. The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic. The mystification is somewhat understandable when we reflect briefly on the apparent meaning of the term "custom" in a legal context. If the term implies that one must act in the same way that others have acted in the past, how can a new custom ever get started when by definition there has been no prior practice? Similarly, how can an existing custom be changed when any change or deviation from prior practice would appear to be illegal? In a brief but often cited article, Josef Kunz called this "a

challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution." ³ Curiously, this admission did not stop Kunz in the same article from pronouncing whether each of a list of norms was or was not a rule of customary international law. Several of his pronouncements are demonstrably incorrect under present international law and very likely were wrong at the time he wrote his article (1953).⁴ Possibly the lack of a consistent theory of custom underlying his conclusions accounts for their variance from those of other scholars. If so, it is certainly unfair to single out Kunz, for most publicists do not, as he did, frankly admit that there are logical gaps in their theories of custom. What results is a tremendous amount of disagreement among scholars and publicists over the rules of customary international law. Hopefully, a consistent theory of custom might tend to resolve some of these substantive disagreements.

Nevertheless, some scholars have minimized the importance of finding such a theory. Herbert Briggs, for example, wrote that the dilemma of how new custom can be created or old customs changed "has created more difficulties in theory than in practice." ⁵ This remark is certainly true with respect to courts, the context in which it was made. For judges rarely if ever fail to decide a case because the theory behind their decision is not clear. Their function is to make decisions, not to straighten out theoretical disputes. On the other hand, one might argue that the relative paucity of state recourse to the World Court—and the misunderstandings on the part of many states as to the reasonableness or adequacy of many of the World Court's key decisions—stem largely from the basic inconsistencies associated with the concept of custom. When the rules for finding the rules of law are themselves vague or ambiguous, law becomes unpredictable, and states hesitate to gamble their claims to adjudication within such a loose legal system.

In general, judges as well as students of international law have a right to demand theoretical clarification of their subject. For unless the reasons for reaching a decision can be articulated, there will always be suspicion that the courts or the "experts" are relying primarily upon intuition or bias in reaching their results. Indeed, in the long run, national respect for and acquiescence in the rules of international law may be a function of the degree to which the theoretical underpinnings of these rules and legal processes can be stripped of the mystery that in these formative years of world rule of law still enshrouds much of its jurisprudence.

We can get an idea of the confusion and illogic surrounding the concept of customary international law by examining the most widely quoted formula for the derivation of a customary rule of law. The author, Judge Manley O. Hudson, one of the most widely respected authorities of his time, announced his prescription after studying the writings of hundreds of legal scholars at the request of the International Law Commission. The formula consists of five "elements" required for the "emergence of a principle or rule of customary international law": "[1] concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; [2] continuation or repetition of the practice over a considerable period of time; [3] conception that the practice is required by, or consistent with, prevailing international law; [4] general acquiescence in the practice by other States"; [5] the establishment of "the presence of each of these elements . . . by a competent international authority." ⁶ Let us consider briefly each of these elements in turn.

The first one, an apparently neutral initial criterion, has numerous concealed difficulties. To begin with, who is to determine whether a situation falls within the domain of international relations? Such a determination can make the crucial difference in many cases. Many big-power unilateral interventions in the affairs of neighboring countries have been claimed to be "purely internal" affairs; who is to say otherwise? Or, consider a state's treatment of its own nationals. If the treatment amounts to genocide, or perhaps even apartheid, can other states condemn it as a breach of *international law*? In other words, are a government's acts toward its own citizens capable of "falling within the domain of international relations?" Judge Hudson's formula offers no criteria for such a determination. Additionally, what is meant in the formula by "concordant" practice? Is this a subjective element—that states must be aware that their practice is concordant? If so, how is it proved? Similarly, must they be aware that their practice is "with reference to" the type of domain-of-international-relations situation of Judge Hudson? And how many constitute a "number of States"? Are two states sufficient, or must we have one hundred? Perhaps some of these questions may be answered in the other four elements. In the second, "continuation or repetition of the practice over a considerable period of time," the term "considerable period" is unspecified; it could range from a century to a month. And what is "practice"? Must it constitute overt acts? Would it include expressions of view, such as resolutions in the General Assembly? When a state refrains from acting, would such abstinence amount to a "practice"? If a non-act is the equivalent of an act, how can there be repetitions of non-acts? The third element demands a "conception that the practice is required by, or consistent with, prevailing international law"; here the fundamental dilemma of custom referred to earlier is stated but not explained. How indeed can such an element help to explain "the emergence of a principle or rule of customary international law" as Judge Hudson claims it does? Any new rule of customary law would be based on practice that by definition could not be "required by" or "consistent with" prior law. More importantly, Judge Hudson's formula can not explain how existing laws could change, for a change in the law would again by definition be based on practice that was *not* "consistent with" prevailing law. The fourth element, which requires "general acquiescence in the practice by other States," raises further problems. Not only do we have unspecified terms such as "general" and "other States," but the central concept of acquiescence is left undefined. What does it mean for a state to acquiesce in the "practice" of other states? If Chile and Australia are engaging in a certain practice that affects only themselves, has the United States acquiesced in this practice? How could it *not* acquiesce? A note of protest would not only be ineffective, but would be undiplomatic and impolite. Or, if we changed the situation so that the Chilean-Australian practice *did* affect the interests of the United States, what would be the significance of a note of protest that did *not* lead to a withdrawal of the practice by Chile and Australia? Would we say that, although it wrote a note of protest, the United States in fact acquiesced in the practice because it did not take effective steps, as a superpower, to compel a termination of the practice? Judge Hudson concludes, "Of course the presence of each of these elements is to be established as a fact by a competent international authority." This final element does not fulfill its apparent purpose of assuaging those who had doubts about the preceding four. It states that international custom does not exist until a "competent international authority" pronounces it to exist. But such an authority could never make an initial determination of custom without

contravening this requirement that a prior determination must have been made by itself or a similar international authority. Moreover, international customary law obviously existed well in advance of the League of Nations or the Permanent Court of International Justice, and long before states began to have recourse to bilateral arbitral tribunals. Even apart from these considerations, "competent international authorities" are given occasion to pronounce upon only a small fraction of the international norms invoked by states in their international relations. Some norms indeed involve questions so vital to common state interests that no international authority today or in the foreseeable future can be expected to be given the opportunity to "find" the law.

In sum, the late Judge Hudson's criteria appear to raise more questions than they solve. Yet they accurately reflect a consensus of legal scholars who have studied the concept of custom, and prominent scholars still quote these elements.⁷ An exception is Oliver Lissitzyn who, in noting that serious questions have been raised as to the "adequacy and usefulness of the traditional concept" of custom, recently called for a "thoroughgoing critique" of the matter.⁸

The Possibility of a Theory of Custom

The need for an explanation of custom does not prove that an explanation is possible. Indeed, theorizing in international law would seem hazardous, inasmuch as it attempts to set down in words a picture of a fluid, ever-changing process. Nations never precisely repeat their acts or interactions; a nation does not remain precisely the same from one moment to the next. As Heraclitus said in 500 B.C., "You cannot step twice into the same river." Moreover, law itself is ultimately a psychological, immaterial concept; it is a convenient abstraction that enables us to help predict, shape, and control human behavior by reference to the abstract "norms" of law that allegedly exert a psychological pressure upon people to adapt their behavior to such norms. But how can we apply a psychological concept to a completely fictitious entity such as a state? Of course, we may penetrate the state's veil and look to the effect of international law upon its decision-makers, and yet the resultant behavior, as we know from studies of small groups, may be more than the sum of its decisional parts. Finally, we are confronted with data that are static and historically frozen, and it may be only a "pious opinion," in Sir Arthur Eddington's words,⁹ that what we call "custom" is the same as what states appear to be doing in their behavioral interactions. As Hubert Blalock has put it, "One *thinks* in terms of a theoretical language that contains notions such as causes, forces, systems, and properties. But one's *tests* are made in terms of covariations, operations, and pointer readings."¹⁰

Despite these difficulties, many of which are common to the social sciences in general, jurisprudence has the advantage of having operative data that are all verbal. Laws as *words* help shape human behavior. National decision-makers and their legal counsel refer to these words in their diplomatic correspondence, and justify their actions by invoking legal formulae. Legal descriptions communicate to man the nature of the powers and institutions available to him for effectuating his legally permissible desires, or indicate to him that which he ought to refrain from doing. In this latter usage as a prohibition and not a power, legal rules communicate to the receiver the expectations of others (society, other nations) who might retaliate if he disobeys the prescriptions. Crucially, these rules contain in their language their own justification. As H. L. A.

Hart has demonstrated, it is central to the concept of law that the rules themselves are a *sufficient reason* for punishing one who disobeys them.¹¹ On the other hand, Myres McDougal and his associates have maintained that international law is merely and solely a *process* of authoritative decision-making, and that rules are only helpful guides to possible policy alternatives. Legal rules, McDougal writes in a footnote, "exhaust their effective power when they guide a decision-maker to relevant factors and indicate presumptive weightings."¹² In contrast, international law is "the comprehensive process of authoritative decision."¹³ Despite these highly Heraclitean views of law as a description of a process, many of the essays of McDougal and his associates are arguments for or against the legality of certain acts or proposed policies. These arguments attest to a different view of "law," that of a verbal norm or standard of behavior that can and may affect the behavior of the reader.

The concept of custom is in a sense archetypical of the preceding strengths and weaknesses of legal theorizing. Custom is a dynamic process of law-creation, yet it is also a restraint on illegal dynamism. The theory of custom must provide for change and adaptation in customary law, yet it must also establish enough stability so that it can exert a pressure on decision-makers to refrain from certain contemplated actions that would violate the customary rule. A rather delicate balance exists between these static and dynamic components of a theory of custom, and thus a resolution cannot be achieved in a few sentences or a few pages. To be sure, it is tempting to pronounce the concept of custom an entirely relative idea, deriving differing contents from different contexts. Zdenek Slouka recently wrote that the role of the factors affecting the emergence of a customary norm "is relative to the conditions in which those factors operate."¹⁴ However, in his study he examined only one instance, although at great depth, in which custom was purportedly operative. Yet theorizing in international law requires the drawing of generalizations from a number of instances and in this sense is an inductive process. But Slouka appeared to assert deductively that his failure to find "custom" in the development of the law of the continental shelf establishes the relativity of custom in other instances in which he did not examine.

The danger indeed exists--Slouka's study is perhaps an example--that in an overly close examination of any one situation "law" may appear to become vague, remote, and irrelevant. Facts in all their sharpness and immediacy seem to blot out the generalities of the law, as young lawyers often find when they start in practice. But law is inherently a collection of generalizations; its generality is a strength that buys utility and applicability at the cost of precision. Here, too, custom is an archetype, for even when it is applicable it may generate a rule that is disobeyed, and yet the disobedient practice must contain the seeds of a new and contrary rule of custom (or else change would be impossible). Thus the examination in depth of single instances contains a pitfall--the observer may be witnessing not a poor instance of conformity to the rule he has in mind but a good disconfirmatory instance of it that will lead to a new, contrary rule.

In light of these observations, what may we briefly conclude as to the requirements of a theory of the concept of custom in international law?

The theory must be internally consistent. This obvious requirement would apparently be violated in the third of Judge Hudson's "elements" for the "emergence" of a customary rule, cited

previously. A *new* rule, or a *change* in a rule, cannot be "required by" prevailing international law. Thus Judge Hudson's statement of the basic dilemma of custom is on inspection inconsistent. This does not simply mean that it is not as good as other possible statements; rather, inconsistency renders the statement completely valueless as meaningful communication.

The theory must be general without being vague. It is necessary to reshape our generalizations in the light of all the evidence that is examined, and adjust the level of generalization to that which permits meaningful inferences from categorizable situations. At the same time we must avoid a specificity that would crumble the generalizations into millions of fragments descriptive only of unique events, for such fragmentation would not only render communication impossible but would also negate the concept of law.

The theory must fit all the inductive evidence. International law, as Georg Schwarzenberger has demonstrated, is an inductive process.¹⁵ Even when authorities like Judge Fitzmaurice claim that international law is in part made up of natural law principles,¹⁶ they are really claiming this as a matter of inductive observation of the behavior of national decision-makers and the decision-makers' conceptions of the content of international law.¹⁷ The difficulty is that many writers purport to base their theories on what states actually do in practice and on what courts actually decide, and yet they occasionally overlook or dismiss certain instances which do not fit their preconceived theories. Many writers, for example, have claimed that the Nuremberg principles in the decisions of the International Military Tribunal following World War II are not really international law. Or, in the matter of customary international law, many writers have disparaged the reasoning in the leading case, the *S.S. Lotus*,¹⁸ by stating that the reasoning, which we shall examine later, was used by the World Court "only once"¹⁹ or "only a single time"²⁰ in this case among all that have been brought before the Court. Moreover, most writers make no attempt to relate the rules in treaties to the formation of customary law, even though they admit that treaty rules can somehow harden into, or become part of, general customary law. It is clear that any attempt at a comprehensive theory of custom must take into account the World Court's majority opinion in the *Lotus* Case as it was handed down, the process of customary law formation from rules in treaties, and all other evidences of state practice that have ever been suggested as relevant to an understanding of the concept of custom.

It is of course impossible for any person to read all the cases and diplomatic correspondence in order to formulate a general theory. The present study is based on an examination of the World Court cases, the relevant cases (by reference to indices and analytical tables of contents) reported in the United Nations series of international arbitral awards and in the International Law Reports series (fifteen volumes and thirty-two volumes, respectively), and a reading of all the prize cases decided by the United States Supreme Court. Many other cases were read when cited by writers on international custom or in other cases bearing on the problem. In addition, the relevant American and British digests of international law were consulted for leads as to cases and to diplomatic correspondence. Over two-hundred textbooks and monographs on international law bearing on custom and treaties were consulted, as well as articles in approximately thirty of the leading American, British, Canadian, French, and Italian journals in international and comparative law. Citations in these sources to hundreds of other books and articles were followed up. Many of the debates and reports of the International Law

Commission provided good evidence of states' views as to customary law. However, the greatest deficiency in the evidence has undoubtedly been the matter of state papers and diplomatic correspondence. The researcher is limited to looking up material on known disputes, to incidents cited by other writers, or to "fishing expeditions" in several volumes. One person, or even a team of hundreds, cannot read all the international diplomatic correspondence. Yet numerous claims are settled amicably, and many potential clashes and claim-conflict situations are avoided, through diplomatic offices. These settlements, recorded in state papers, are perhaps the best evidence of custom reflecting the consensus of states. Yet this evidence will remain buried until governments and universities set up data banks and index this rich material in information-retrieval computers.

The theory must be parsimonious. Occam's maxim is vindicated by scientific experience, which shows that the simpler of two theories is the one likelier to be correct.²¹ This hypothesis would seem required especially in international law since states constantly use and refer to theories of law-formation as arguments in their diplomatic correspondence and state papers. International law is very practical-it exists and survives because it works. Therefore international law is not likely to be based on theories that are so arcane or complex as to make the law inaccessible to the daily requirements of international claimants. One reads with skepticism Torsten Gihl's argument that it is so "difficult" and "time-consuming" to discover one of the elements in custom that the amount of special research necessary places the task out of the reach of governments or even writers of textbooks.²² Quite the contrary, since custom is used so frequently in international legal claims, Gihl's own theory of how to find custom is more likely to be wrong.

The theory must be objectively determinable. Several prominent scholars, including Kelsen,²³ Sørensen,²⁴ Lauterpacht,²⁵ and Jenks,²⁶ have argued that proof of custom is a matter for the "arbitrary discretion" or "free appreciation" of courts. These statements usually appear after long, complex, and unresolved inquiries into the theoretical nature of custom. Of course, such statements constitute not a theory but the absence of one, as they give neither the reader nor the judge himself any idea of how to proceed to find proof of custom. International law surely would not have persisted if its central concept were completely indeterminable, as these writers have suggested. An examination of state and judicial practice will hopefully show that proof of custom is not founded upon unfettered discretion but rather upon objectively determinable and replicable procedures of legal methodology.

To say the foregoing is not to argue for a completely mechanical view of law formation. Some room remains for creativity on the part of judges and appreciation on the part of national decision-makers as to the substance of international law. Alf Ross has shown that "objectivation is never complete" and that there is always a "creative element" inherent in the determination of law.²⁷ Indeed, Ross must be right for two reasons: the fallibility of man as an observer of external events, and the fact that each observation (or judicial decision) in turn becomes part of the data that subsequent observers will take into account in their assessment of rules of law. Courts never simply "find" the law; if they did, they would have no need to cite prior decisions as "precedents" of the law that is purportedly discoverable *de novo*.

Finally, the theory must be claim-oriented. Recent legal scholarship has shattered the

traditional vantage point of the publicist who mixes into his recipe for international rules heavy doses of his own ideas as to what the rules ought to be. Rather, we must view international law as a psychological bargaining mechanism involving conflicting claims among national decision-makers and their legal counsel. If we attempt to study international law as it is viewed by participants in the international arena, we will be inclined to replace absolutistic theories with the more accurate description of a *process* by which the better of two conflicting claims prevails. In other words, two competing claimants may each have a case that falls short of fulfilling the requirements for a given absolutistic theory, yet the fact that one claimant has prevailed or will prevail over the other necessitates an abandonment of that "theory" and its replacement by one which takes account of the *relative* superiority of persuasiveness.²⁸

The claim-oriented viewpoint is probably equally important in emphasizing the functional, as opposed to the conceptualistic, aspects of theory. We should eschew Platonic concepts that appear to have, but actually lack, universally agreed characteristics. Nearly all the terms in Judge Hudson's list of elements of custom exemplify this fallacy. Rather, any suggested theory should be examined functionally: why it is needed, how states use it, and whether it works. Or, in short, we need parsimonious induction—the formation of minimal consistent generalizations that account for the usage of legal concepts among states.

The preceding requirements of a theory of custom are simply those of the scientific method in any study of human behavior. Certainly a student of international law especially should use the methods of science rather than those of art since the stakes of international relations are too high to be made dependent upon subjective discernment. Too many scholars in the past have said that the determination of customary law is a matter for experts who have experience in the study of law. Yet such pronouncements tend to excuse the lack of a clear theory of customary-law determination. A related fallacy is the seemingly deductive approach of the many scholars who start with the notion of "sources" of law and proceed to derive from that notion the elements of custom, treaty, and so forth. Instead we should focus upon the actual behavior of governments. The question is, how do governments, through their legal representatives, look at custom? How do their perceptions of custom control their own behavior? And how do their perceptions influence the kinds of arguments that they make to others? What, indeed, do their arguments tell us about where they look for evidence of custom and how much proof they feel is necessary to substantiate a claim that a given rule is in fact a rule of customary international law? We must look at what governments *do*. The objective facts of their behavior speak louder than any deductive theory.

Footnotes to Chapter 1

¹ See Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 *A.J.I.L.* 782 (1966).

² See Bowett, *The Law of International Institutions* (1963).

³ Kunz, "The Nature of Customary International Law," 47 *A.J.I.L.* 662, 667 (1953).

⁴ Kunz denied that a norm of general customary international law concerning the continental shelf had come into existence; he said that at most there was a trend toward such a norm "and even that, perhaps, only by multilateral treaty." *Id.* at 669. He denied that recent

treaties have given rise to a "new rule of customary general law concerning privileges and immunities of international organizations." *Id.* at 668. And he added, "it is certain that, contrary to the opinion of some writers, the so-called 'Nuremberg Principles' have, up to now, not become principles of customary general international law." *Id.* at 669. That all of these propositions are incorrect now, and were probably erroneous in 1953, will be shown in various places throughout the remainder of the present work.

⁵ Briggs, "The Colombian-Peruvian Asylum Case and Proof of Customary International Law," 45 *A.J.I.L.* 728, 730 (1951).

⁶ 2 Anthill Law Common, *Yearbook* 26 (1950).

⁷ See, e.g., Parry, *The Sources and Evidences of International Law* 61 (1965); Briggs, *The Law of Nations* 25 (2d ed. 1952).

⁸ Lissitzyn, "Review: Jenks, *The Prospects of International Adjudication*," 4 *Colum. J. Transnat'l L.* 159, 161 (1965).

⁹ Eddington, *The Nature of the Physical World* 255 (1933).

¹⁰ Blalock, *Causal Inferences in Nonexperimental Research* 5 (1961).

¹¹ Hart, *The Concept of Law* 86-88 (1961).

¹² McDougal *et al.*, *Studies in World Public Order* 887 n. 109 (1960).

¹³ McDougal, "A Footnote," 57 *A.J.I.L.* 383 (1963).

¹⁴ Slouka, *International Custom and the Continental Shelf* 174 (1968).

¹⁵ Schwarzenberger, *The Inductive Approach to International Law* 8-42 (1965); see D'Amato, "The Inductive Approach Revisited," 6 *Ind. J. Int'l L.* 509 (1966).

¹⁶ See Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," *Symbolae Verzijl* 153, 161-68 (1958).

¹⁷ Compare Riesenfeld, "Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court," 60 *A.J.I.L.* 511, 514-15 (1966) with Verdross, "Jus Dispositivum and Jus Cogens in International Law," 60 *A.J.I.L.* 55 (1966).

¹⁸ P.C.I.J. Rep., Ser. A, No. 10, at 4 (1927).

¹⁹ MacGibbon, "Customary International Law and Acquiescence," 33 *B.Y.I.L.* 115, 129 (1957).

²⁰ Sørensen, *Les sources du droit international* 109 (1946).

²¹ See Deutsch, Singer, & Smith, "The Organizing Efficiency of Theories: The N/V Ratio as a Crude Rank Order Measure," 9 *Am. Behav. Sci.* 30 (1965).

²² Gihl, "The Legal Character and Sources of International Law," 1 *Scandinavian Studies in Law* 53, 84 (1957).

²³ Kelsen, "Théorie du droit international coutumier," 1 *Revue Internationale de la Theorie du Droit* 253, 266 (1939).

²⁴ Sørensen, *op. cit. supra* n. 20, at 110.

²⁵ Lauterpacht, *The Development of International Law by the International Court* 378 (1958).

²⁶ Jenks, *The Prospects of International Adjudication* 263 (1964)

²⁷ Ross, *A Textbook of International Law* 91 (1947).

²⁸ "Persuasiveness" as used here is not restricted to logic or reasonableness; rather, one may be persuaded because of the simplicity of the rule, its general applicability, its accordance with the felt needs of the international community, sociological factors, the need for change, the need for reinforcement of existing rules, the fact that a person one respects likes the rule, and so forth. These and other motives, singly or in combination, undoubtedly enter into the minds of the decision-makers who assert international claims and pass upon the claims of others.

"Persuasiveness" is an inductive conclusion after these motives have done their work.

On the other hand, many writers tend to focus upon the motives themselves as reasons for championing any given rule as a rule of customary law. It is often said, for instance, that a given rule emerged because the rule answered the felt needs of the international community. The speciousness of this approach may be seen in a brief example. Scholars have claimed that the principle of national sovereignty over superjacent airspace emerged during and after World War I because the principle answered the felt needs and interests of the international community at that time. But we can imagine that if instead a rule had emerged analogous to that of freedom of the seas, writers would be saying that the principle of freedom accorded with the felt needs of the international community in the air as well as it did with respect to the seas centuries before. Thus, it is clear that such vague motivational statements, while apparently "explaining" a development *ex post facto*, are useless as indicators of rules in their formative stages..