

The Context and Functions of Custom

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The International Law Context

To examine the validity and functions of custom, we must first consider the meaning of international law itself. The term "international law" minimally refers to a set of words, concepts, and procedures of argumentation usually found in diplomatic correspondence and discourse, but also present in the verbal activities of many international organizations and tribunals. There is nothing inherently magical or significant about the term; others might have been employed to refer to the same set of words and symbols. However, the particular phrase has so often been used by the relevant actors—the diplomats, lawyers, and nation-state and international officials --that it has become the accepted descriptive term. The noun "law" within the phrase is appropriate for the same reasons: nation-state officials and their advisers engaged in claim-conflict situations with their opposite numbers from other states typically refer to large portions of their communications as "law" or as "legal argument." Rarely if ever do they raise the question whether it is "law" in the proper sense of the term that they are arguing about; rather, they argue about the content of the relevant norms of law.

To say this much is not to imply that legal language is the most important component of inter-nation communications. Clearly, states invoke legal language only when it serves their political interest to do so. "Law" is one kind of negotiating technique; there are others, including the threat of force, the appeal to morality, the argument that "we would like to but our allies won't let us," and so forth. Our perspective here is limited to international law, one small part of international communications. A major cost of this restricted perspective is losing sight of the broader political considerations which determine whether or not "law" should be invoked in a claim-conflict situation or, if it is invoked, what proportion of legal argumentation should be included in the strategic "mix" in the negotiating procedure. Surely an international *lawyer* must face these questions; as Myres McDougal has persuasively demonstrated, a responsible view of the task of legal advisers to governments embraces the use of legal talents in the articulation, clarification, and assessment of policy. Just as any domestic lawyer must assess his client's needs as a whole before he can responsibly advise him to draw up a will, ask for an injunction, bring a legal action, or sign a waiver, so too an international legal adviser must be able to advise a government as how to best articulate and effectuate its interests, and whether a resort to legal argument and international tribunals would be best suited to the particular policy. But to say that an international lawyer must be trained in political science as well as law is not the same as saying that the two disciplines have an equivalent content. Law can be the servant of policy, but that is not to say that what is politically expedient is legal. One may justifiably study international law separate from the political considerations that determine whether and to what extent "law" shall be resorted to in any given claim-conflict situation.

Although "policy" and "law" in the sense just stated can be viewed separately, in practice they often are interrelated. For example, it is often a nation's policy to obey international law. A nation's interest in seeing increasing respect for the rule of law among states may transcend its desire to win a particular dispute. Alternatively, on a cost-effectiveness basis, resort to law may be the cheapest way to win many disputes. The use of military force in the age of atomic

weapons is costly and dangerous, and often gains no significant international advantage (although important exceptions to this generalization can easily be called to mind). But if legal counsel can help to structure a situation so that a nation can actualize its policy by nothing more than legal argumentation, the nation will often choose the legal approach. And in any event, the ready availability of the "international law" approach tends to guarantee that in nearly every policy situation a state will investigate the legal angle. If the state then decides to reject the legal approach or to combine this approach with other tactics, it has made a policy decision in the entirely or partly nonlegal sense.

Laying aside matters of policy, we may ask of the words and concepts and modes of argumentation that make up "international law," just what kind of "law" is it? Austin in 1832 raised the basic question of the meaning and validity of international law by denying that it really is law "properly so-called"; rather he labeled "positive international morality" the "rules" that are "imposed upon nations or sovereigns by opinions current amongst nations."¹ To some students, Austin was merely playing with definitions. Glanville Williams in 1945 argued that the controversy started by Austin was purely a verbal one, having no reference to actuality.² Austin, in Williams' view, was merely quarreling over a stipulated definition. On the other hand, one might argue that Austin surely would have been aware of such a simple rebuttal to his massive scholarship, and that even though he may have appeared to be talking about definitions, what he really had in mind was a more empirical approach to the concept of law.³ In any event, Williams seemingly misses the psychological forest for the verbal trees. Our question is neither what is the "proper" definition of international law nor whether the "meaning" of the term depends on whatever definition is stipulated by the writer, but rather what international diplomats and nation-state officials in their international relations think "international law" really is. Here, Austin's reasoning, apart from his conclusion, has some relevance. Austin seized upon a command-sanctions syndrome in characterizing "law," and finding that "international law" is not a system of commands issuing from a determinable sovereign and backed by sanction, Austin called it "positive international morality." But then we must ask whether the lack of this command-sanctions syndrome has prevented nation-state officials from thinking of international law as really "law"? Clearly not, in terms of the evidence of state papers, diplomatic correspondence, arguments in the United Nations, opinions of domestic tribunals involving questions of "international law," and even numerous national constitutions. But this evidence, quantitatively impressive, is insufficient if one asks whether the nation-state officials are impressed or affected by "international law" in the same degree that their behavior is shaped by domestic law. Thus one must go further and ask whether Austin's syndrome is or was ever a valid description of the fundamental basis of domestic law. As Lon Fuller has argued at length, an insignificant number of domestic laws have long prevailed that relied solely upon centrally controlled sanctions for their efficacy.⁴ Moreover, much depends on how one defines the "sovereign"; if the sovereign is the society at large, then its "commands" are usually self-obeyed, just as international law is the expression of the shared expectations of all the states. In addition, as Roger Fisher has emphasized, the Austinian analogy is misleading in that international law is more properly compared to that class of domestic legal disputation involving the state as a party to the litigation.⁵ In the United States, for example, the government typically complies with adverse decisions in the Court of Claims even though the successful private litigant could not possibly enforce his judgment against the government. In all countries, the government (or the "people") is represented in court in criminal cases or tax cases, and yet obeys adverse decisions for the purpose of keeping the entire legal system operating. Although some legal scholars (including Kelsen⁶ and notably Robert W. Tucker, in a recent attempt to salvage Kelsen's text⁷)

have strained to find an element of sanction behind all international rules (whether the "sanction" of possible collective security or of world public opinion), most legal scholars and statesmen, probably for the reasons just adduced, have remained unconvinced that international law is not law properly so-called. In this respect the weight of history is on their side, for notions of sovereignty, legislation, and centrally enforced sanctions post-dated the medieval concept of law as perfectly relevant and applicable even if it is not physically enforced.

It would be possible to take a medievalist position opposed to Austin's and claim that today international law should not be called "law" because it does not comport with Divine law, eternal law, or the immutable principles of natural law and the moral order. Again, this contention could not be dismissed by arguing, along with Glanville Williams, that all depends on how one defines law. Rather, the psychological problem is the extent to which decision-makers in the international arena would require international rules to comport with Divine or natural law in order for them to be entitled to international respect. Perhaps in the days of Grotius and Pufendorf, nation-state officials were amenable to the arguments that certain courses of action were illegal under international law *because* they were incompatible with natural law. The emphasis on morality and natural law in the writings of many of the classicists, and their influence on history (e.g., Grotius' freedom of the seas), are evidence that these factors were important in the general view of what "law" really was. But even today one might argue that many international norms are morally required or consistent with natural law, if one wants to define morality in international relations as the pursuit of peace. Indeed, McDougal acknowledges that his writings are value-oriented and that "reasonableness" in terms of shared resources and minimum world public order constitutes a prerequisite to the validity or persuasiveness of legal argumentation in claim-conflict situations.

Of course states will occasionally violate or flout an international norm and "get away with it," just as individuals with "political connections" might in domestic legal systems. Moreover, some international rules have nothing to do with morality or natural law: for example, the breadth of the territorial sea or "sovereign immunities" for public vessels. Certain writers struggle with these instances as possibly at variance with their theories of law as commands backed by sanctions or as the dictates of morality. But if law is viewed as a highly human endeavor, rooted in psychology and not in logical constructs, the central issue is whether, in the minds of nation-state officials, diplomats, international lawyers and jurists, and other international claimants, the entire body of international rules takes on an increased sense of validity and authoritativeness because *some* of the rules *are* backed by sanction or consistent with their notions of natural law or morality. What may indeed take place is a kind of mental transference of feelings of legitimacy from some rules that are clearly valid (to the observer) to other rules in the same system. As Festinger has pointed out, all men make the effort to avoid the "cognitive dissonance" that would result from holding inconsistently categorized distinctions.⁸ So long as a large number of rules are categorized as "international law," it is difficult to separate those that are clearly enforced and enforceable from those that are not. It is even harder to separate those which the observer thinks are morally required from those about which he has moral doubts. It is far simpler to concur with other observers that all of them are "legal," and work to bring about a change in the contents of those rules which one finds undesirable.

The foregoing jurisprudential considerations do not completely account for such validity and efficacy of international law as may exist in today's unsettled world. Other perhaps more important psychological considerations can be mentioned. First is the generally shared expectation of reciprocity: a legal norm against a state's immediate interests may be obeyed either because of the expectation of similar reciprocal compliance in the future or because of the

expectation of present lateral compliance on a different international legal issue. Reciprocity, too, has a transference and a cumulative effect. As expectations are satisfied, the notion of reciprocity is reinforced, not only as to the rules in question but also as to other rules in the system. Second, McDougal has reemphasized Scelle's conception of *dédoublement fonctionnel*: nation-state officials who assert international claims are often the same officials who pass upon the claims of others.⁹ This situation also may evoke a spirit of reciprocity or an even-handedness in these officials that would reinforce the idea of the rule of law. However some officials have the kind of patriotism which leads them to interpret all claims, those asserted and those assessed, in the light of the short-run interests of the client state. A third characteristic of international law, therefore, may be of still greater importance: most of the rules of law *are* in the self-interest of the states. This characteristic has come about primarily through the operation of custom in international law, for the evidence of the desires of states is recorded in their customary practice in international dealings. Custom is a very "democratic" modality of law-formation; it gives all states a chance to participate in the practice that constitutes custom. In this sense custom is a perfect reflection of the decentralized international legal system. No one would deny that this system is entirely different from the domestic legal systems serving as paradigms for Austin and other writers of the positivist persuasion, insofar as it lacks a central legislature and a pervasive adjudicatory system having compulsory jurisdiction. But although some writers, including H. L. A. Hart¹⁰ and recently William Coplin¹¹--who view international law through domestic-law glasses--feel that international law will remain "primitive" until a central legislature is established, it is probably closer to the truth to start from the premise that international law is extremely complex and "mature" for the very reason that this type of law has had to survive without the simple corrective device of a central legislature. Statesmen and their legal counsel have devoted great effort over the centuries to fashioning a legal system that would serve their basic international interests. The rules of international law that have resulted, forged from the often heated conflicts of international claims in the process loosely termed "custom," probably better reflect the national interests of all the states than would the legislation resulting from a (premature) central legislature. One might imagine, for instance, that if a world government were set up tomorrow it might begin issuing laws that would take a clear majority position on topics such as expropriation, wars of "national liberation," immigration, and so forth, that might split nations into two hostile camps and create armed minority resistance to such legislation. The more flexible and subtle process of customary law, on the other hand, may allow these questions to be gradually broken down into manageable components and give the community of nations time to adjust to changing world conditions and perceptions. Although some observers from time to time express disappointment in the "inconclusive" legal arguments that appear to characterize the decentralized international legal order, this inconclusiveness or flexibility may be a very small price to pay for peaceful settlement in a world that is not ready for central government.

The decentralized process of customary law formation undoubtedly leads nation-state officials to view international law not so much as an encroachment on their "sovereign" freedom of action as the manifestation of their national stability. The simple rule, for example, that requires states to respect one another's national boundaries averts much possible misunderstanding and conflict. One nation need not be concerned with another nation's internal troop movements, "internal" being defined by the boundaries respected in international law. The absence of rules delimiting boundaries was the cause of much American Indian tribal warfare in the seventeenth and eighteenth centuries and Bantu warfare in southern Africa in the eighteenth and nineteenth centuries, for the tribes involved had no clear way of distinguishing "internal" troop movements from incipient intertribal aggression. Many other international rules help

reinforce the territorial sovereignty of states; the total impact of these rules is perhaps South Africa's best safeguard against an international military campaign against apartheid within South Africa's own territory. This reinforcement helps to explain why South Africa has been quite scrupulous in its observance of international law (and the jurisdiction of the World Court) even though the *content* of this body of international rules is itself slowly evolving in the direction of the outlawry of apartheid. Similar illustrations are easily adduced: in the hottest periods of the cold war the United States and the Soviet Union scrupulously respected international norms and treaties relating to fishing rights, fish conservation, freedom of travel on the high seas, rules relating to airspace (the first official Soviet objection to the U-2 flights occurred when Powers' plane was shot down, and the United States, in Louis Henkin's words, "virtually pleaded guilty" to the violation of Soviet airspace¹²), rules relating to diplomatic personnel and embassies, and so forth. And here, as previously, the support that many international rules give to national interests and "sovereignty" has a cumulative effect upon international law as a whole. Not only does a transference effect take place, but also the validity of the entire body of international rules is reinforced by the consensus that the rules are in the subjects' best interests. Thus, South Africa would find it hard to pick and choose from the body of international rules those solely in her interest; rather, she must accept "international law" as a whole in order to derive basic benefits, even at the expense of admitting evolution in the content of the laws that sooner or later may be a crucial lever for change in the practice of apartheid.

In light of the preceding arguments, which have referred primarily to international law as a whole, what may we now adduce as a useful meaning of the term "rule" or "norm" of law? In the first place, any rule of law may take the form of a power or a prohibition; the former, while of great importance in international law (particularly as the constitutive rules of international organizations), is not of direct relevance to the present study. Secondly, rules as obligations, prohibitions, or restraints upon behavior might nevertheless be viewed, in McDougal's sense, as indicators of the boundaries of conflicting international jurisdictions or as guides to the formation and clarification of policy alternatives. But the former "systemic" use of rules as parametric indicators seems almost a by-product of international law, for the main question always remains "What if a boundary is violated?" And the latter use, often reiterated in the writings of McDougal and his associates, seems of even a lower order of importance for the policy-maker if he is at all imaginative will surely consider the alternatives suggested by international law, as well as numerous other possibilities that the law never contemplated. Thus, a third idea of rules or norms may be emphasized: that of prescriptive statements which exert, in varying amounts, a psychological "pressure" upon national decision-makers to comply with their substantive content. For example, the norms relating to "freedom of the seas" probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, and not to interfere with numerous foreign shipping or fishing activities on the high seas. The idea of a rule of law as an indicator of a psychological pressure upon the person to whom it is addressed might be illustrated by a hypothetical example of one of the simplest of all possible rules of law--a "stop" sign on a street or highway. Imagine that one of these traffic signs exists in a community where every driver habitually does not bring his motor vehicle to a full "stop" at the particular sign, but rather shifts into low gear or otherwise slows down his motor vehicle when approaching the sign and then passes it. Has the traffic ordinance represented by the sign been violated? Yes, from a technical, as well as a legal, point of view. A policeman could, if he so desired, arrest any or all of the drivers in that community for failing to observe the "stop" sign. But does the violation of the "stop" sign mean that the sign is of no value in that particular community? Here the answer would have to be in the negative, for the sign functions

as a kind of "pressure" upon drivers to *slow down*. If its purpose was to help to prevent traffic accidents, it may have succeeded admirably by getting motor vehicles to slow down and proceed with caution. As we shall see later in an examination of McDougal's view of the functions of rules of warfare, one might very well interpret many international rules relating to rights of neutrals, prisoners of war, and so forth, as "pressures" that have some influence in shaping the conduct of war, no matter how many outright violations of those rules occur. Perhaps Henkin has in mind this sense of the term "rules" when he concludes that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."¹³ of course, the degree to which the normative "pressure" of various rules is felt is a function of the particular rule's degree of acceptance as a part of the general body of international norms, of the threat of sanctions behind the rule or the transference of the idea of sanctions from other rules to that rule, of the "morality" of that rule or of the body of rules of which it is a part, of the state's national interest in following that rule and its perception of reciprocal behavior on the part of other states, and of all the other considerations previously suggested. But while the felt pressure may vary from state to state and from rule to rule, whether or not the rule can persuasively be called "international law" is a significant and perhaps a decisive factor in diplomatic bargaining and thus the proper concern of international jurisprudence. The present study is addressed to part of this determination; namely, how to establish whether an alleged rule is a rule of international law by virtue of the process called "custom" in international law.

Determining the Content of International Law

International law only exists in the sense that nation-state officials in their international dealings *refer* to it, both by direct literal reference and by the use of legal argumentation in claim-conflict situations. In the aggregate, states are therefore both the creators of international law and the subjects of the legal regime they have created. It follows from this that the content of the rules of international law depends upon the *consensus* of nation-state officials as to what the content of the law is. One might say that, at the state-perception level, international law is entirely phenomenological;¹⁴ it does not "exist" apart from the way representatives of states perceive it. No extra-systemic referents for ascertaining its content are available; in particular, writers on international law are constrained to describe the law as it exists in the consensus of nation-state officials. If a writer attempts to introduce his own opinions of what the law should be, he runs the risk of irrelevancy. This is not to say that the shared beliefs of nation-state officials might not include some normative notions as to the content and direction of rules of law, but rather that any writer or observer must be careful to attribute such normative tendencies, to the extent that they are operative, to the creator-subjects of international law and to exclude values that are wholly his own.

As this last point illustrates, the consensus of the relevant nation-state officials is not a simple set of opinions about rules. It may include a normative dimension as well as a factually descriptive one, an example being the recent General Assembly resolutions on the law of outer space, indicating a direction for the law to take when the technological opportunity arises. Moreover, the consensus includes a dimension that the ascertainment of substantive rules and tendencies lacks. It comprises shared attitudes and expectations as to the method of determining applicable rules when the rules in question have not yet been consciously accepted by the generality of states. This secondary function of the international consensus is the one that is most basic to the present study and will be examined more fully later in this chapter.

Here the more general question may be asked: how is the content of this consensus determined? Myres McDougal has suggested in a similar context a resort to "current social scientific techniques" such as the "mass interview" and "intensive interviews."¹⁵ His suggestion has the virtue of recognizing that the problem of the content of law is basically psychological, but interview techniques cannot for several reasons be decisive in this situation. In the first place, there are some difficult methodological hurdles. Who would be interviewed? A head of state might say one thing about his own beliefs on the content of international law (assuming he agreed to be interviewed), his legal counsel might say something else, and his diplomatic corps might come up with a third version. The interviewer would have to know how, in the governmental system, disparate views would be reconciled in any given claim-conflict situation. This inner policy-making machinery, in turn, might vary according to the kind of claim-conflict situation in which the nation finds itself. The interviewer could never know, even if he posited a hypothetical claim-conflict case, how this machinery might work in arriving at a national decision with respect to the claim. Nor would the interviewees know this in advance; though they might say that they would react to another nation's claim in a certain way, in practice they might be dissuaded by wholly unforeseeable arguments coming from unexpected internal or external governmental decision-making circles.

A second and more fundamental obstacle to the interviewing approach is that the governmental officials might have no incentive to express their true reactions to the alleged rules suggested by the interviewer. Officials of a nation having no continental shelf might, for example, vehemently assert to the interviewer that in their opinion no international norm exists that would relegate exclusive use and control over the resources of continental shelves to their adjacent states. But their actions might contradict their verbalizations. If such a state as a matter of its international policy behaves in a manner entirely consistent with the alleged rule of adjacent state use and control of the continental shelf (for example, by not placing its own drilling rigs on any continental shelf or by altering its navigation routes to accommodate the drilling platforms of other states on the high seas), any observer would be forced to conclude that it has manifested its acceptance (however reluctantly) of such a rule. Indeed, this hypothetical case illustrates a basic difficulty with the concept of "prescription" defined by McDougal as "the projection of policy for value shaping and sharing accompanied by coordinate expectations of authority and control,"¹⁶ or more simply the "performance of the legislative function."¹⁷ From the point of view of the nation having no continental shelf of its own, it would be highly desirable to project a *res communis* policy for the shared use of all continental shelf resources; such a nation, if asked, might even assert that such a norm is already a prescription. In fact, however, international law has never proceeded from the basis of each nation's belief as expressed to an interviewer of the existence or nonexistence of particular rules of law. To be sure, some institutional means exist for registering consensus, such as resolutions in the General Assembly of the United Nations or comments on drafts proposed by the International Law Commission. The formality of these methods tends to ensure the registration of official views of states, as compared with the views of officials within states who may write an article for a law journal, deliver a speech, or prepare a memorandum later cited by writers on international law. But in any event the official views do not amount to "prescription," for they represent in many instances what states would like the law to be rather than what they think the law is—particularly when the "ought" and the "is" are at variance. A different conclusion would follow, as we shall see later, if General Assembly resolutions and International Law Commission drafts were, like treaties, binding upon states.

In the preceding hypothetical example, what if a majority of questioned nation-state

officials were all to deny that an alleged rule is in fact a rule of international law? Even here, all nations concerned might possibly manifest a contrary persuasion in their actual practice. To determine what is the operative rule of law, we must revert to the previous argument that international law is phenomenological. Thus we might find, first, that the policy-makers of state A believe in their own minds that X is *not* a currently valid rule of law. They may further believe that their counterparts in a number of other states do not themselves believe that X exerts an obligatory "pressure" on state behavior. Nevertheless, the basic fact remains that state A is not alone in the world and must take into account the expectations of policy makers in other states. But these external expectations, the officials of state A reason, are undoubtedly based not on private calculations of whether other nation-state officials "really believe" that X is not a valid rule, but rather on the real-world manifestations of the generality of states with respect to rule X. If rule X is actually manifested in the practice of the generality of states, it would be useless to discover through interviews, secret communications, perusal of biographies, or other techniques that many or even most of the nation-state officials do not personally believe in the validity of the rule. We must conclude that, although the content of international law is a function of the psychology of the participants, this psychology is rooted in strategic calculation rather than in simple beliefs about norms. Or to put the point differently, what matters to the decision-makers in state A is not what they believe is the right rule, nor what their counterparts in other states might believe or desire, but rather what rules are manifested in the conduct (both verbal and physical, in a sense to be specified at length later) of the generality of states.

But if the preceding arguments are accepted, we return full circle to what the nation-state officials might say to an interviewer. If a given interviewee is not personally convinced that rule X is valid, he nevertheless might assert to an interviewer that X is indeed the valid rule if his best calculation is that other states are manifesting rule X in their practice. For example, the officials of a new state N might become convinced by McDougal's arguments that national sovereignty over superjacent airspace is a wasteful and undesirable rule,¹⁸ and that aircraft should be free to fly wherever they choose. However, a cursory glance at international practice will convince these officials that all the other states subscribe to *aer clausus*. Thus, what would the officials of N gain by proclaiming to an interviewer their belief that freedom of the airspace "is" the international norm? They might thereby be inviting other states to use N's airspace freely but with no reciprocal free use to the aircraft of N, for other states might view N's proclamation not as a statement of existing international law but as a free exemption of N's airspace. On the other hand, the officials of N might be willing to take this risk if they thought that by expressing themselves in favor of freedom of the air they might be contributing to a change in international attitudes that could eventually result in a departure from *aer clausus*. In short, one cannot tell in advance what strategy the officials of N would have in mind in making their statements about the rule in question. This is a basic reason why state officials themselves do not conduct world public opinion polls, but rather look to the international norms that are manifested in the practice of other states.

Methods of discovering the content of international law that are more traditional than interviewing techniques may involve similar false assumptions. For example, the suggestion has often been made that researchers should examine unofficial sources such as interoffice governmental memoranda, speeches by government officials to their domestic constituents, diaries, and other similar materials, in order to discover the "subjective elements" in a state's "beliefs" as to the content of various international rules. But clearly this approach has all if not more of the weaknesses of the depth interviews, for numerous contradictory ideas and private motives may be in circulation in a state before that state finally adopts a foreign policy stance that

has international legal implications. Another more pervasive error is the assumption that a state's official views on questions of international law may be lifted without special care from opinions of the Attorney General or other counsel, from diplomatic notes, from briefs filed on behalf of the state before international tribunals, and in similar places where the state is taking an adversary position. While these materials are of course significant, they must be examined in light of how the particular controversies to which they were addressed were ultimately resolved. Otherwise they may represent only extreme positions taken for the purpose of bargaining, with an intent to compromise during the course of negotiations or oral argument. Just as a top official, if interviewed, might express an opinion on a rule of international law that corresponds with his view of what the national interest would desire to be the best rule, so too state papers prepared for use in diplomatic bargaining or in adversary proceedings may reflect this normative egocentric viewpoint. But these views are not necessarily what the state as a unit "believes" to be the rule of law, since the state may be prepared to act on a lesser rule, from its point of view, that more truly reflects shared international interests. Finally, there is a curious but widespread doctrine among publicists that rules in international treaties may be cited as "evidence" of customary international law only if the states party to the treaties intended at the time of ratification that the rules in the treaties codify the underlying customary norm. The peculiarity of this doctrine is underscored by the fact that hardly any writer who has espoused it has gone on to offer any proof of the parties' attitudes or intentions during the negotiation of the treaty to codify or to depart from the "underlying" customary norm. But even if a writer were to attempt to do so, it would be very difficult, for the reasons previously suggested, to come up with any evidence of the state's official views of what the norm would be in the absence of the treaty. Indeed, the officials engaged in negotiating the treaty were probably either interested in coming up with a clear treaty rule to replace a highly ambiguous customary norm, or inclined to adopt an "extreme" view of the customary norm as a bargaining tactic to get the other side to sign the treaty.

International consensus, in conclusion, is manifested objectively as a result of strategic calculations of the states that are the creator-subjects of international law. It is misleading to look for "subjectivities" or national "intentions" *apart from* what the state manifests in its international relations. The questions which now arise, and which take up the remainder of this book, are: What kind of consensus accounts for customary law formation? and How exactly is that consensus manifested?

Custom as a Secondary Rule of Law Determination

Any developed legal system, according to H. L. A. Hart, will be found to contain two fundamentally different types of rules: *primary* rules that indicate to individuals what they must or must not do, and *secondary* rules that are concerned with the primary rules themselves. The function of the secondary rules is to "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."¹⁹ Typical secondary rules are found in national constitutions, enabling acts, and (in countries with an unwritten constitution) in the generally accepted rules giving to the monarch or the parliament the power, by acting in a certain way, to modify the laws of the land. Clearly the secondary rules reflect the country's consensus as to the legitimate way of making and changing the primary rules.

Lacking a central legislature having an organized police force, and further lacking courts of compulsory jurisdiction, the international legal system—to an extent because these elements are missing—has evolved a well-developed set of secondary rules. By contrast, only a limited number

of *primary* rules (e.g., freedom of the seas, *aer clausus*, diplomatic immunity, *pacta sunt servanda*) enjoy the status of being the products of a clear international consensus. If all the nations in the world, or very nearly all, agree that X is a rule of international law and manifest adherence to X in their international relations, then X is itself a primary rule that exists simply because the international consensus says it exists. But many other primary rules, perhaps including the ones just mentioned when they were in their formative stages, cannot be said to be the direct products of an international consensus. A majority of states, for instance, may never have had occasion to pass upon certain kinds of claims that have affected a small minority of states. Or a large number of states may not have had the geographical or technological prerequisites to be involved in the early stages of a rule. An extreme example of the latter might be a hypothetical rule of "right of way" of artificial weather satellites; at present only two countries would have occasion to participate in such a rule. In the domestic common law system, an analogous illustration is the effect on the public of rules resulting from judicial decisions directly involving a mere handful of litigants. So too in international law many rules affect many or even most states which have not participated in the rules' direct formation. But they *have* participated, they *have* expressed their consensus, as to the appropriateness or legitimacy of the procedure by which these primary rules have arisen.

This international consensus as to secondary rules, making a comprehensive system of primary rules possible, can be found in the *method of argumentation* in international claim-conflict situations. When the legal counsel of one state or international organization argue that X is the operative rule of law, the arguments they adduce to prove the validity of X indicate their conception of the relevant secondary rules. The opposing side will argue that X is not the operative rule, but generally they will agree with the advocates of rule X as to the kinds of secondary rules that are relevant. For example, if one side cites a World Court opinion holding X to be a rule of international law, the other side will not usually be heard to dispute the validity and relevance of that citation--rather they will challenge the rule X by invoking other secondary rules that might indicate, for instance, a modification of X by subsequent state practice or even a subsequent opinion by the World Court itself. That there should exist in international dispute a fairly common, objective set of rules relating to the validity of asserted primary rules is not a matter for surprise. For if this sort of agreement did not exist, statesmen would not talk about "international law." The very existence of international law, as discussed previously, depends upon a set of freely transferable assumptions about legal discourse, just as the existence of mathematics depends upon the recognition by mathematicians of all countries that there are basic, invariable "secondary rules" such as addition, subtraction, and one-to-one correspondence.

One example of a secondary rule has just been mentioned: a rule found in the majority opinion of a World Court judgment. Remarkably, states will cite such rules in their comments on draft proposals of the International Law Commission or in their diplomatic messages, even when the states have not accepted, or have only partially accepted, the World Court's jurisdiction. Of course states will cite rules in World Court judgments even though they were not parties to the particular case in which the rule was formulated. We can only conclude that there is a very strong consensus in favor of World Court judgments as a secondary source of primary rule-determination. And only to lesser extent will states cite the judgments of other international tribunals, including arbitral tribunals, to support their arguments as to the validity of contested primary rules.

Another example of a secondary rule in international law is the possibility that a "general principle of law" recognized in the domestic regimes of "civilized nations," to quote in part from Article 38 of the World Court Statute, is also a universal international rule. Another possibility is

that the "teachings of the most highly qualified publicists of the various nations," also a phrase from Article 38, can be a way of determining primary rules of international law. In some respects, General Assembly resolutions may be acquiring the status of secondary rules in current international practice. Moreover, rules contained in multilateral conventions, such as the Geneva Conventions on the law of the sea, are cited by international counsel in claim-conflict situations even when the disputing states are not party to the particular convention being cited. But perhaps the most important secondary rule in international law is the secondary rule of custom. Not only has the process of customary law formation been responsible for a vast amount of international norms, but also, as may reasonably be expected, custom may help to regulate and define the scope of the other secondary rules just listed.

We must bear in mind that custom is indeed a secondary rule of law-formation. It can account, in Hart's words quoted previously, for the introduction, ascertainment, variation, or elimination of primary rules. This is precisely what Judge Hudson's formulae failed to do, as we saw in the preceding chapter. Our remaining task is to specify *how* custom operates as a secondary rule in the international legal system. In the following Part, we shall consider the elements of custom as derived from evidences of state behavior--settlements of claim-conflict situations, judicial decisions consented to by states, diplomatic correspondence, and the opinions of publicists and committees of jurists that have been widely cited and quoted in official state argumentation.

Footnotes Chapter 2

- 1 Austin, *Lectures on Jurisprudence* 173, 183 (5th ed. 1885).
- 2 Williams, "International Law and the Controversy Concerning the Word 'Law,'" 22 *B.Y.I.L.* 146 (1945).
- 3 *But cf.* Hart, *The Concept of Law* 226-31 (1961). Compare D'Amato, "The Neo-Positivist Concept of International Law," 59 *A.J.I.L.* 321 (1965).
- 4 See, e.g., Fuller, "Positivism and Fidelity to Law--A Reply to Professor Hart," 71 *Harv. L. Rev.* 630 (1958).
- 5 Fisher, "Bringing Law to Bear on Governments," 74 *Harv. L. Rev.*, 1130, 1132-34 (1961).
- 6 Kelsen, *Principles of International Law* (1952).
- 7 Kelsen, *Principles of International Law* (Tucker ed. 1966).
- 8 Festinger, *A Theory of Cognitive Dissonance* (1957); *cf.* D'Amato, "Psychological Constructs in Foreign Policy Prediction," 11 *J. Confl. Res.* 294, 306-09 (1967).
- 9 McDougal *et al.*, *Studies in World Public Order* 276 (1960).
- 10 Hart, *op. cit. supra* n. 3.
- 11 Coplin, *The Functions of International Law* 13-25 (1966). See D'Amato, "International Law-Content and Function: A Review," 11 *J. Confl. Res.* 504 (1967).
- 12 Henkin, "International Law and the Behavior of Nations," 114 *Recueil des Cours* 171, 176 (1965).
- 13 Henkin, *How Nations Behave* 42 (1968).
- 14 See Husserl, *Ideas: General Introduction to Pure Phenomenology* (1931); Otaka, *Grundlegung der Lehre vom Sozialen Verband* (1932); Singer, "The Level-of-Analysis Problem in International Relations," 14 *World Politics* 77 (1961).
- 15 McDougal, Lasswell, & Reisman, *The World Constitutive Process of Authoritative Decision* 117 (mimeo, 1967).
- 16 *Id.* at 111-12.

17 McDougal, Lasswell, & Vlasic, *Law and Public Order in Space* 656 (1963).

18 *Id.* at 247-54.

19 Hart, *Op. Cit. supra n. 3*, at 92.