

## CHAPTER 2: CUSTOM

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There are two kinds of international law: universal and particular. Universal international law applies to all states. Particular international law is another way of referring to treaties, both bilateral and multilateral, that are binding on the particular states that have signed and ratified them.

International environmental law is developing so rapidly that a great deal of it can be found in multilateral conventions. Nevertheless, the rules found in conventions have to be assessed against a background of universal law. This background law "fills in the gaps" between treaty provisions, and in addition helps us to interpret those provisions (no treaty is self-interpreting).

Where does universal international law come from? It derives from the practice of states. When two or more states enter into an accommodation that resolves their conflicting legal claims, that accommodation (or "dispute resolution") constitutes in effect a precedent for other states. The record of state accommodations is for international law like a reporter of case decisions is for domestic law. On the international level, this record is generally called "custom," while at the domestic level it is generally called "common law."

The present Chapter highlights some of the recurring issues of customary international law that arise from state interactions on global environmental issues. The opening section on Rapid Custom dispels the widespread misconception that "custom" requires years to be developed. The next excerpt on Dynamic Custom focuses on the issue of whaling to argue that a pattern of mutual international accommodations over the years can be projected into a customary norm that protects whales as legal entities.

How much environmental protection is afforded by customary law? The strength of custom is its universality, but its weakness consists in its generality. The third essay in this Chapter explores some of the weaknesses inherent in custom's lack of specificity. The fourth excerpt takes the position that nations ought not to rely on custom as a source of liability standards for pollution because many of the customary norms were generated in the first instance by industrialized nations that took advantage of the lack of restrictions on pollution during their own period of industrialization.

### A. Rapid Custom<sup>1</sup>

To speak of rules of customary international law in a field as new as that of international environmental law may appear surprising. However, it is possible to discern among current norms "evidence of a general practice, accepted as law," even though only a short period of time has elapsed.

The Conference on the Law of the Sea which met between 1973 and 1982 adopted one of the most important modern international treaties. During the long process of its elaboration, in which all states of the world participated, a certain number of existing rules were codified, but there also arose a consensus on several new norms. On the basis of this consensus an international practice formed, even before adoption of the treaty. This was particularly the case with the exclusive economic zone, where it was recognized from the beginning that coastal states have sovereign rights for the purpose of conserving and managing living and non-living natural resources and have jurisdiction to preserve the marine environment. It was also accepted that coastal state jurisdiction to legislate regarding ships in innocent passage through the territorial sea includes measures to conserve marine biological resources and preserve the marine environment and to prevent, reduce and control marine pollution.

On other points one may observe emerging rules of customary international law at different stages in their evolution. The formulation of nonbinding principles undoubtedly plays an important role in this process. Another factor is the repetition of specific rules in numerous international texts. Third, it is possible that the process of formulating a rule which may or may not have been applied by different states creates a rather rapid consensus which leads to general acceptance of the rule in state practice. The follow-up to the nuclear accident at Chernobyl illustrates this development, which is not only characteristic of international environmental law, but is also increasingly evident throughout international law.

On April 28, 1986, an explosion occurred at the central reactor of the Chernobyl nuclear power plant, as a result of negligence and human error. Although nearly 50,000 persons were evacuated in the following days, the Soviet government failed to inform other states until much later and did not give a complete explanation of the event until a specially organized meeting of the International Atomic Energy Agency took place between August 25 and 29, 1986. However, within hours of the accident a radioactive cloud formed and drifted first towards Scandinavia, then towards the south of Europe, crossing Austria, Germany, Switzerland, Italy, and Yugoslavia.

One of the rules which had emerged from prior state practice, largely based on repeated conventional requirements, was the obligation to urgently notify states at risk of having their environment adversely affected by any situation or any event. The non-application of this principle by the U.S.S.R. after Chernobyl made it necessary to formulate the norm explicitly based on the parallel conventional provisions. Thus, 58 states signed an agreement in Vienna on early notification of a nuclear accident. As its title indicates, it provides that states should give notification without delay of any nuclear accident which will or might lead to radioactive consequences for another state. The information required is detailed in the Convention. The treaty entered into force with unusual speed one month later. The speed of codification of this rule can only be explained by the circumstances and by the recognition of a prior customary international duty to notify.

It can be argued that several other customary rules of international environmental law have emerged or are emerging in state practice. In particular, it clearly seems required that no state cause or allow its territory to be used to cause damage to the environment of other states. This norm first arose in international jurisprudence and was formulated in principle 21 of the Stockholm Declaration before being adopted and reaffirmed in numerous other binding and nonbinding international instruments. The duty to cooperate, announced by principle 24 of the Stockholm Declaration, also appears to have acquired this status, as well as reflecting a fundamental norm of the entire United Nations system. Other principles may be cited which form the core of the international common law of the environment. In sum, it is possible to speak of a body of customary international environmental law composed of fundamental principles underlying the entire system and applicable to all environmental subjects.

### **B. Dynamic Custom<sup>2</sup>**

This essay examines the history, and argues for the "presentation"<sup>3</sup> of a broadening international consciousness about whaling amounting to an *opinio juris*--the psychological component of international customary law. When this component is added to the evolving practices of states toward whaling, the combination of psychological and material elements arguably constitutes binding customary law. The dynamic element of that custom and its underlying philosophy generate, we conclude, an emergent entitlement of whales--not just "on behalf of" whales--to a life of their own.

The six stages in the treatment of whales that we have recapitulated--free resource, regulation, conservation, protection, preservation, entitlement--may be viewed as a progression from self-interest to altruism,<sup>4</sup> or from individualism to communalism,<sup>5</sup> but we suggest that they are better conceptualized as a broadening of international cultural consciousness. The whalers of the early twentieth century were persuaded to accept the second stage--regulation--even though many of them found that it hindered their individual freedom. They accepted it on the rational grounds that they themselves might destroy their livelihood as a whole unless certain common restrictions were placed on the whaling enterprise. This rational conclusion constituted an increase in breadth of consciousness, from "do anything we want" to "don't do some things that might hurt other whalers and eventually ourselves."

Similarly, the step from regulation to conservation met resistance; whalers had to be persuaded that long-term conservation would benefit the industry as a whole, which in turn enhanced the economic interests, or at least prospects, of each whaler. Again, consciousness was broadened. And so it continued with each of our six analytic stages. In the fifth and sixth stages, whalers faced the loss of their entire enterprise, yet the increase in consciousness now embraces the environment as a whole, the planet on which we all live. In this respect, whalers should be no different from anyone else; everyone's self-interest is in a stable and viable ecosystem. Hence, it would be a mistake to conclude that the transition from the first stage to the second, or for that matter from any one stage to the next, has been more difficult or historically important than any other.

Although the distance covered between stage one and stage six amounts to a catastrophic change--from uninhibited freedom to prohibition--the change from any one state to the next was incremental, depicting the same underlying psychological and philosophical process of increasing breadth of consciousness. For this reason, we contend that what we have denominated as the last stage--entitlement--is not qualitatively different from the others. Rather, it is part of a relentless, historically necessary progression. We may or may not be in the final entitlement stage today--different people will think differently--but its seeds were planted in each of the five preceding stages.

We have been sketching, implicitly, a trend in the component of customary international law called *opinio juris*. The development of international custom is inevitably a dynamic process, and the seeds of a future conflict-resolving synthesis that constitutes the claim conflicts among states. To anticipate a customary trend is to argue that, in a sense, it already exists. We have seen, in the history we have recounted, the practice of states (reflected through their whaling activities) moving through six stages that are best characterized as increases in international breadth of consciousness. This combination of practice and consciousness formally constitutes the material and psychological elements of general custom. What states *do* becomes what they legally *ought* to do, by virtue of a growing sense that

what they do is right, proper, and natural. The dawning sense of duty to the environment "to protect the ability of our small, green planet to sustain life" is evidence of a sense of obligation that constitutes the *opinio juris* component of binding customary international law.

Hence, if our argument is accepted, we have sketched more than a political-cultural history of a relentless increase in breadth of consciousness about whales. We have suggested an *opinio juris*--a growing sense of international legal obligation toward whales. In the current stage of that progression, nearly all nations accept the obligation of preservation. And in this consensus of preservation, we suggest that there is the incipient formation of the final, decisive stage--the entitlement of whales to life. Whether that final stage has already arrived cannot be definitively determined. But we argue that in its inevitability it has already been anticipated in the law.

### C. The Environmental Protection Afforded by Custom<sup>6</sup>

Customary international law does offer some modest protection for the environment. And as the web of treaty law protecting the environment increases, resonances from it enter into customary international law. That development has the effect of tightening the standards by increasing the number of occasions on which a credible argument can be mounted that customary international law has been breached. As environmental consciousness expands, the practice of nations alters to comply with the new norms, which makes it easier to contend that an "international custom, as evidence of a general practice accepted as law," has emerged.

There is a quartet of cases that quite usefully establishes some of the strengths, and also the weakness, of customary international law. The *Corfu Channel* case is authority for the proposition that if a nation knows that harmful effects may occur to other nations from facts within its ken and fails to disclose them, it will be liable to the nation that suffers damage.<sup>7</sup> In other words, every state has a duty not to knowingly allow its territory to be used for acts contrary to the rights of other states. While that principle ought not to be overworked, it is capable of wide application.

One can just conceivably imagine the principle being applied to a nation that allowed the unlimited manufacture and use of chlorofluorocarbons, to the detriment of the ozone layer, even though the nation was not a party to either the Vienna Convention or the Montreal Protocol. It is not necessary to extrapolate from the principles of customary international law very far, if at all, to fit them into some of the circumstances that might arise in relation to pollution of the atmosphere.

The *Trail Smelter* arbitration, which dealt with transboundary air pollution, also has potential application to ozone and climate change.<sup>8</sup> To the extent that the case establishes a principle of good neighborliness, it may be applied to global environmental problems. The principle would be that no state has the right to use its territory in such a manner as to cause injury to the atmosphere by emissions when serious consequences are involved and the injury to the atmosphere is demonstrated by clear and convincing evidence. Indeed, the principle established by the case may go further than this and is certainly capable of extension.<sup>9</sup>

The *Lake Lanoux* arbitration turned on the interpretation of a particular treaty, but it may establish the principle that a state has the duty to give notice when its actions may impair the environmental enjoyment of another state. A nation is not entitled to ignore the interests of another.<sup>10</sup> That principle can have clear and obvious application to situations involving ozone depletion and climate change.

The *Nuclear Tests* cases, brought by Australia and New Zealand in the International Court of Justice, do not establish much, regrettably, because the Court ducked the issue.<sup>11</sup> Nonetheless, some legal inferences can be drawn from the decision. The burden of the complaint was that the nations were entitled to be free from the hazardous increased radiation due to fallout from the Mururoa atmospheric testing atoll. Because France ceased atmospheric testing while the case was before the Court, the judges found it unnecessary to address the issue, attributing "legal effect" to France's public undertaking to halt the testing. Press statements do not often have legal effect at international law, but this one did. The case can be used to argue that there are circumstances in which government declarations can be binding, a prospect pregnant with possibilities.

While customary international law must not be underestimated or ignored, it cannot be said to have sufficient strength to cope with the problems of the global environment. Customary international law has some advantages. It is flexible, although there is an irreducible minimum that must be met for a norm to be counted as part of international law. The principles discussed have their own charm and complexity. They are not without some capacity to impose binding obligations on states regarding the global environment. But, even on the most optimistic view, customary international law can hardly be said to have sufficient scope or content to prevent damage and provide sufficient sanctions to be directed against the perpetrators of the damage when it occurs. Above all, customary international law is not a regulatory system and cannot be turned into one. Yet a regulatory system is required. It should have defined standards, monitoring, exchange of information and some prohibitions.

One requirement of the test of custom is that a general recognition must be found among nations that a certain practice is obligatory. Even on a more relaxed view of what that test may entail, the body of customary law simply lacks the horsepower to deal with many of the great problems. Professor Ian Brownlie concludes in a survey of the international customary rules of environmental protection that custom "provides limited means of social engineering." To him the limitations of custom evidence the need for the development of new institutions, standards and localized regimes. He reached that conclusion in 1973. Everything which has happened since then reinforces that conclusion.

#### **D. Custom and State Liability: A Critical Perspective**<sup>12</sup>

In constructing a regime of state liability for transnational pollution, publicists have chosen customary international law as the primary source for liability standards.<sup>13</sup> A rule of customary international law develops when states follow a constant practice under the conviction that international law requires their conduct. International legal analysts have located evidence of customary international law in state practice, treaties, charter declarations, the works of international lawyers, and judicial decisions of international tribunals.<sup>14</sup>

Presumably, international custom serves as a promising point of departure for the elaboration of a liability system. After all, the very concept of international custom assumes nearly unanimous acceptance of certain practices<sup>15</sup> and thus a quasi-participation of states in an implicit, unstated regime. Yet rules of customary international law rarely specify required behavior. Rather, these rules state international duties that are too vague to provide any guidance about what behavior is acceptable or to facilitate ready application of these rules to specific disputes. When publicists endow these abstract duties with substantive content and attempt to generate determinate outcomes for future disputes, they inevitably privilege the interests of some states over others.

Many developing nations, moreover, refuse to consider themselves bound by rules of customary international law, however determinate the rules may be. In particular, newly independent states regard such rules as relics inherited from the wealthy, powerful states of a bygone era of colonialism and imperialism.<sup>16</sup> Such resistance undermines the assumption that states accepted, implicitly or explicitly, customary international duties upon entering the community of nations.

Developing nations' resistance is especially acute in the context of international environmental law. Developing countries often regard the application of customary international law to transboundary pollution as an attempt by developed nations to curtail Third World industrial growth. At the 1972 Stockholm Conference, for example, developing countries resisted the imposition of environmental standards created by the industrialized powers. The Brazilian delegate at Stockholm declared that his country had no interest whatever in the subject of pollution control, which he viewed as a "rich man's problem." Although developing nations have begun to moderate their opposition to environmental protection, they continue to regard customary principles of environmental protection as infringements on their development. Arguing that the developed nations benefited from the absence of environmental standards to exploit resources and promote growth before the latter part of the twentieth century, the developing countries maintain that the developed nations should bear the cost of abating the environmental harm they have wrought.

The reluctance of developing states to accept custom as binding law reveals the primary shortcoming of an approach to liability that adopts rules of customary international law as its point of departure: the assumption of universally-shared norms. The dominant approach to codification presupposes a set of values common to all states. But the heterogeneity of interests motivating states' behavior compels the articulation of customary duties in the most vague and general terms. Divergences of norms and values explain why one cannot codify more specific obligations of international custom without sacrificing the consensus that state practice and *opinio juris* necessarily imply. Yet publicists have misconstrued this generality as indicative of a homogeneity and consistency. When the publicists embarked on the codification project to create a system of international liability, they failed to examine the propriety of choosing custom as their starting point.

#### FOOTNOTES CHAPTER 2

<sup>1</sup> Alexandre Kiss and Dinah Shelton, *INTERNATIONAL ENVIRONMENTAL LAW* 105-07 (1991). Copyright 1991. Reprinted by permission.

<sup>2</sup> Anthony D'Amato & Sudhir Chopra, *Whales: Their Emerging Right In Life*, 85 AM. J. INT'L L. 21 (1991). Copyright 1991. Reprinted by permission.

<sup>3</sup> We use the term "presentation" as denoting the present instantiation of legitimately realizable expectation. See I. MACNEIL, *THE NEW SOCIAL CONTRACT* 60 (1980) ("presentation... is the bringing of the future into

the present").

<sup>4</sup> See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713-22 (1976).

<sup>5</sup> See Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 206-12 (1990).

<sup>6</sup> Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 264-66 (1992). Copyright 1991. Reprinted by permission.

<sup>7</sup> *Corfu Channel (UK v. Alb.)*, 1949 ICJ REP. 4 (Judgment of Apr. 9). One would have supposed that the principle applied to the Chernobyl accident, but the timidity of nations with nuclear installations of their own appears to have made them leery of bringing claims.

<sup>8</sup> *Trail Smelter (U.S. v. Can.)*, 3 R. INT'L ARB. AWARDS 1905 (1938 & 1941).

<sup>9</sup> See Kirgis, *Technological Challenge to the Shared Environment: United States Practice*, 66 AM. J. INT'L L. 290, 290-94 (1972).

<sup>10</sup> *Lake Lanoux Arbitration*, 12 INT'L ARB. AWARDS 281, 315-16 (1957) (citing the Treaty of Bayonne, Dec. 1, 1856; Apr. 14, 1862; and May 26, 1866; additional Act, May 26, 1866, Arts. 8-19).

<sup>11</sup> *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, Interim Protection, 1973 ICJ REP. 99 and 135 (Orders of June 22); 1974 ICJ REP. 253 and 257 (judgments of Dec. 20).

<sup>12</sup> Editors of the *Harvard Law Review*, *Developments in the Law--International Environmental Law*, 104 HARV. L. REV. 1484, 1504-06 (1991). Copyright 1991. Reprinted by permission.

<sup>13</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601-604 introductory note (1987) (identifying customary international law as the source for its rules of state responsibility and liability).

<sup>14</sup> See, e.g., W. GORALCZYK, *PRAVO MIĘDZYNARODOWE PUBLICZNE W ZARYSIE* 102-03 (1983); S. WILLIAMS & A. DE MESTRAL, *AN INTRODUCTION TO INTERNATIONAL LAW* 16 (1979).

<sup>15</sup> See Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073, 1074 (1986).

<sup>16</sup> See L. CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* 406 (1989).