

of decisions.<sup>31</sup> Even less do we need a doctrine that gives a green light to powerful nations to interpret to their own ends the now autonomous and more flexible norms governing the meaning of aggression and self-defense. That danger has been the cry of those few skeptics who have doubted all along the validity of a *jus cogens* concept as either a norm of international public policy (*ordre public*) or a positive law substitute for a Vattelian law of nature. Professor Weil has described this situation as allowing the most powerful few elites speaking for the international community simply to impose their version of a suitable ideology in the guise of peremptory norms.<sup>32</sup>

In itself, the Court's Judgment is carefully reasoned, but risky. The public appeal of an independent customary international law against the use of force in international relations is powerful. Since this appeal recognizes the norm as a principle of world order free from the Charter structure, perhaps it also partakes of the same dangers that inhere in the concept of *jus cogens*. As Ian Sinclair well understood, *jus cogens* has the potential of both Dr. Jekyll and Mr. Hyde.<sup>33</sup>

GORDON A. CHRISTENSON\*

### TRASHING CUSTOMARY INTERNATIONAL LAW

Central to the World Court's mission is the determination of international custom "as evidence of a general practice accepted as law."<sup>1</sup> Students of the Court's jurisprudence have long been aware that the Court has been better at applying customary law than defining it. Yet until *Nicaragua v. United States*,<sup>2</sup> little harm was done. For in the sharply contested cases prior to *Nicaragua*, the Court managed to elicit commonalities in argumentative structure that gravitated its rulings toward the customary norms implicit in state practice. The Court's lack of theoretical explicitness simply meant that a career opportunity arose for some observers like me to attempt to supply the missing theory of custom.<sup>3</sup>

But the *Nicaragua* case was not forged out of the heat of adversarial confrontation. Instead, it reveals the judges of the World Court deciding the

<sup>31</sup> Reisman, *Has the International Court Exceeded its Jurisdiction?*, 80 AJIL 128, 134 (1986) (quoting Elihu Root on the distinction between impartial adjudication by consent and the conduct of political relations in important matters through diplomatic negotiation, and the skepticism by states of the tendency of international judges to be drawn into the tradition of diplomacy).

<sup>32</sup> Weil, *supra* note 13, at 441.

<sup>33</sup> I. SINCLAIR, *supra* note 8, at 131.

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<sup>1</sup> Statute of the International Court of Justice, Art. 38.

<sup>2</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14 (Judgment of June 27).

<sup>3</sup> D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1962); A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971).

content of customary international law on a tabula rasa. Sadly, the Judgment reveals that the judges have little idea about what they are doing.

### I. PRACTICE AND *OPINIO JURIS*

What makes international custom authoritative is that it consists of the resultants of divergent state vectors (acts, restraints) and thus brings out what the legal system considers a resolution of the underlying state interests. Although the acts of states on the real-world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system. The role of *opinio juris* in this process is simply to identify which acts out of many have legal consequence.

The World Court in the *Nicaragua* case gets it completely backwards. The Court starts with a disembodied rule, for example, the alleged rule of non-intervention found in various treaties, United Nations resolutions and other diverse sources such as the Helsinki Accords. It then finds that state acceptance of such a rule supplies the *opinio juris* element. Finally, it looks vaguely at state practice. Although the practice of states, notes the Court, has not been "in absolutely rigorous conformity with the rule," the Court "deems it sufficient" that "instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule."<sup>4</sup>

The Court thus completely misunderstands customary law. First, a customary rule arises out of state practice; it is not necessarily to be found in UN resolutions and other majoritarian political documents. Second, *opinio juris* has nothing to do with "acceptance" of rules in such documents. Rather, *opinio juris* is a psychological element associated with the formation of a customary rule as a characterization of state practice. To make matters even worse, the Court gives no independent evidence even of its own theory that states have accepted the nonintervention rule in various resolutions and documents, except for the question-begging fact that the states subscribed to those documents and resolutions. If voting for a UN resolution means investing it with *opinio juris*, then the latter has no independent content; one may simply apply the UN resolution as it is and mislabel it "customary law." Finally, instead of beginning with state practice, the Court ends with it. Conveniently, the Court finds that whenever state practice conflicts with the nonintervention rule, the practice must be an illegal breach of that rule. This procedure similarly robs state practice of independent content. All we need is the original alleged rule and the empty theory that any practice inconsistent with it does not count.

The poverty of the Court's theory is matched by the absence of supporting research into state practice. The only example of practice given by the Court contradicts its own theory: state intervention for the purpose of "decolonization." Lamely, the Court gets around this unwelcome example of state practice by saying that decolonization "is not in issue in the present case."<sup>5</sup>

<sup>4</sup> 1986 ICJ REP. at 98, para. 186.

<sup>5</sup> *Id.* at 108, para. 206.

The Court's embarrassment would probably only be increased had it seen fit to mention some of the other categories of intervention that contradict the nonintervention theory, such as humanitarian intervention,<sup>6</sup> antiterrorist reprisals,<sup>7</sup> individual as well as collective enforcement measures,<sup>8</sup> and new uses of transboundary force such as the Israeli raid on the Iraqi nuclear reactor.<sup>9</sup>

It is hard to fashion a *customary* rule of nonintervention from all these practices that are inconsistent with such a rule,<sup>10</sup> but in any event the Court did not even try. Rather, it purports to give us a rule of customary international law without even considering the practice of states and without giving any independent, ascertainable meaning to the concept of *opinio juris*.

## II. CUSTOM AND TREATY

The Court fares no better when it considers the impact of treaties upon custom. To some extent, the Court was misled in this regard by the United States, which argued in the jurisdictional phase of the *Nicaragua* case that Article 2(4) of the Charter<sup>11</sup> "is customary and general international law."<sup>12</sup> The United States apparently made this strange concession as an attempt to convince the Court that the UN Charter could not be divorced from the case; on this point, the Court was right that the underlying customary law exists in the absence of the Charter. Nevertheless, the Court took the bait and leaped to the simplistic conclusion that the treaty rule of nonintervention was nearly identical to the customary rule.

That conclusion would not have been easily reached had the Court exhibited any understanding of the process by which treaty rules generate customary law. A treaty is obviously not equivalent to custom; it binds only the parties, and binds them only according to the enforcement provisions contained in the treaty itself. However, rules in treaties reach beyond the parties because a treaty itself constitutes state practice. To illustrate this point, let us consider two hypothetical cases: in (a) a rule arises by the pure process of international custom, and in (b) the same rule arises by virtue of its incorporation into a treaty.

<sup>6</sup> See, e.g., Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 229 (J. N. Moore ed. 1974); Reisman & McDougal, *Humanitarian Intervention to Protect the Ibos*, in *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* 197 (R. Lillich ed. 1973).

<sup>7</sup> Consider the recent (1986) U.S. raid on Libya, or the frequent Israeli raids on Palestinian camps in neighboring Arab countries.

<sup>8</sup> See, e.g., D'Amato, *The Concept of Human Rights in International Law*, 82 *COLUM. L. REV.* 1110 (1982).

<sup>9</sup> See, e.g., D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 *AJIL* 584 (1983).

<sup>10</sup> However, a narrow "core" rule may withstand scrutiny: that transboundary force is illegal when its purpose and result is the acquisition of territory.

<sup>11</sup> Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>12</sup> 1986 ICJ REP. at 99, para. 187 (quoted by Court).

(a) Suppose state *A* attempts to seize narcotics on board a vessel of state *B* within *X* miles of *B*'s coast. State *B* protests on the ground that state *A* lacks jurisdiction. If state *A* nevertheless seizes and confiscates the narcotics, and if *B* takes no retaliatory or enforcement action against state *A*, then a customary law precedent will be established for the rule that narcotics seizures are permissible at a distance of *X* or more miles from the coast of the flag state. This "incident" thus has a precedential effect upon international custom.

(b) Suppose states *A* and *B* enter into a treaty allowing the seizure of narcotics at a distance of *X* or more miles off the coast of the flag state. Such a treaty would be as much a resultant of the *A* and *B* "vectors" as was the previously described seizure-plus-no-retaliation incident. Treaties were indeed invented to harmonize competing interests without recourse to threats or forcible measures, and in this fashion are a much more civilized way of creating custom than the normal process described in example (a). For systemic purposes, the outcome is the same in the (a) and (b) cases; namely, the rule characterizing the resolution of the incident is the resultant of the divergent vectors; it is a "customary" rule of state accommodation.

Customary rules, however, are not static. They change in content depending upon the amplitude of new vectors (state interests). Human rights interests, for example, have worked a revolutionary change upon many of the classic rules of international law as a result of the realization by states in their international practice that they have a deep interest in the way other states treat their own citizens.<sup>13</sup> Thus, reverting to our narcotics example, we can modify the *A-B* rule by a subsequent *C-D* incident that adds to the distance *X*; later, an *E-F* treaty might subtract from the *X* distance; yet later, a *G-H* incident might reinforce the distance established in the *C-D* interaction. Over the long run, the distance *X* will express the resultant of all competing international interests. Another way of phrasing this result is to use Darwinian terms: the customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of all states.

The process of change and modification over time introduces a complex element that is missing from the Court's handling of Article 2(4). It is true that when 2(4) was adopted as part of the UN Charter in 1945, it had a major impact upon customary law. But Article 2(4) did not "freeze" international law for all time subsequent to 1945 (no more than an equivalent customary-law incident would have done). Rather, the rule of Article 2(4) underwent change and modification almost from the beginning.<sup>14</sup> Subsequent customary practice in all the categories mentioned above<sup>15</sup> has profoundly altered the meaning and content of the nonintervention principle articulated in Article 2(4) in 1945.

To be sure, Article 2(4) itself did not have a once-only impact in 1945. It has been reiterated each time a new state joined the United Nations,

<sup>13</sup> See D'Amato, *supra* note 8.

<sup>14</sup> See Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970).

<sup>15</sup> See text at notes 6-9 *supra*.

because the Charter rules are extended each time to embrace the new member state. But each reiteration does not necessarily reinforce the 1945 meaning, because each new state that joins the United Nations does so in the light of the practice of the Charter from 1945 to the date of its admission. Under the rules of interpretation of international treaties, the subsequent practice of states can modify and change the meaning of the original treaty provisions. Hence, state practice since 1945—whether considered as simply formative of customary international law or as constituting interpretation of the Charter under the subsequent-practice rule—has drastically altered the meaning and content of Article 2(4).

The Court's unidimensional approach to Article 2(4) and to other treaties misses all of these considerations. Its lack of understanding, or conscious avoidance, of the theory of the interaction of custom and treaty undermines the authority of its Judgment.

### III. CONCLUSION

If the subject matter of the *Nicaragua* case had not been so important in international relations, the Court's Judgment could be dismissed as a mere sport. Unfortunately, its importance ensures considerable commentary, and the commentary in turn may create the impression that there is much in the Court's Judgment worth studying and analyzing. In my opinion, the Judgment is a failure of legal scholarship. It reveals the august judges of the International Court of Justice as collectively naive about the nature of custom as the primary source of international law.

Of course, the biggest missing element might not be judicial erudition as much as the lack of adversarial clash. More than we usually admit of what we admire about judges on any court may be due to the quality of the briefs and arguments handed to them, rather than their intrinsic familiarity or understanding of the law. The World Court would have been well advised to encourage amicus briefs on behalf of the United States, although even then little can substitute for the quality of a team of attorneys responsible for advocating the best interests of their client.

As a formal matter, the Court's decision is binding on the United States even though the United States walked out of court after the jurisdictional phase of the case. Yet, as a practical matter, only decisions that command respect by virtue of their inherent soundness and scholarly thoroughness are likely to have a real impact. The Court is encouraged to render such decisions by its own Statute. Article 53 provides that, when one of the parties fails to defend its own case, the Court must "satisfy itself" that the claim of the party appearing in court is well founded in fact and law. That requirement seems formalistic and empty in light of the *Nicaragua* litigation.

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