WANTED: A COMPREHENSIVE THEORY OF CUSTOM IN INTERNATIONAL LAW

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The concept of custom occupies a position of fundamental importance in international legal theory. International law is the law manifested by states in their dealings with one another, and "custom" is a formal expression of that manifestation. Although an important modality of international legal regulation is the treaty or convention, when disputes arise as to the interpretation of treaties recourse is made to customary rules of interpretation, including the customary rule pacta sunt servanda.

Another so-called "source" of international rules that has achieved theoretical prominence in recent years is "general principles of law recognized by civilized nations," the term taken from Article 38 of the Statute of the International Court of Justice. But it is evident even here that not all rules applied domestically in most states are relevant or applicable in interstate relations. One must turn to customary international law to determine the applicability and limits of rules promulgated by states vis-à-vis their citizens to the international legal realm.

Article 38 of the ICJ statute indicates another reason for the central importance of custom. The statute directs the Court to apply treaties that establish rules "expressly recognized by the contesting states," but no limit of express recognition attaches to the requirement that the Court apply "international custom, as evidence of a general practice accepted as law." Since many international legal disputes arise among states not party to the same treaty--indeed, a dispute may be a manifestation of a failure to agree by means of a treaty--international lawyers and national decision-

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makers will tend to invoke customary international law in such cases.

The wording of Article 38 does not lay down a requirement that a state objecting to an alleged rule of customary international law must itself have "accepted" the rule or practice in question, but only that there need be "general" acceptance. Although this point has led to controversy, it appears that "custom" might well play a decisive role in international disputes where there is complete disagreement between the parties to the dispute as to the validity of the rules in question and no convincing evidence that the objecting state had previously "accepted" the particular rule.

WEAKNESS IN PRESENT THEORIZING

Despite its importance, the concept of custom has not been the subject of intensive analysis by international publicists. Most of the literature on custom is repetitive and involuted. Mystery and illogic accompanies discussion of the topic of customary obligations, most of which apparently stems from a basic jurisprudential dilemma: how existing rules can be changed, or new ones created, when "custom" seems to require as a condition of its legality that conduct be in conformity with existing customary rules. Professor Kunz called this "a challenging theoretical problem which ... has not yet found a satisfactory solution,"[1] but this admission did not deter him from proceeding to state categorically whether or not a number of rules have attained the status of customary international law.

Taking a different approach, Professor Briggs wrote that the dilemma "has created more difficulties in theory than in practice."[2] In

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[1] Kunz, The Nature of Customary International Law, 47 AM. J. INT'L L. 662, 667 (1953). Professor Kunz declares, inter alia, that the "Nuremberg Principles" have not become principles of customary international law, and that the norms of the continental shelf are at best a mere tendency. Id. at 669.

[2] Briggs, The Colombian-Peruvian Asylum Case and Proof of Customary International Law, 45 AM. J. INT'L L. 728, 730 (1951).

one sense he is right. Courts, pressed to declare solutions to cases, will tend to come up with decisions whether or not the theory is clear to the judges. In a more important sense, however, judges as well as students of international law have a right to demand greater theoretical clarification of their subject. Unless the operant 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 the long run, national respect for and acquiescence in the rules of international law may in part be a function of the degree to which the theoretical underpinnings of these rules and legal processes are stripped of the mysticism that in these formative years of world rule of law still enshrouds much of its jurisprudence.

The degree of confusion, if not illogic, that persists today may be illustrated by a brief examination of one of the most authoritative and widely quoted statements ever formulated as to the criteria of customary international law. In 1950, after making a thorough study of the writings of hundreds of legal scholars, Judge Manley O. Hudson reported to the International Law Commission five "elements" that are required for "the emergence of a principle or rule of customary international law."[3] Let us consider each of these five elements in turn.

1. Concordant practice by a number of States with reference to a type of situation falling within the domain of international relations

This apparently neutral initial criterion has numerous concealed difficulties. First, it does not indicate who is to determine whether the situation falls within the domain of international relations. Such a determination can make the crucial difference in a number of cases such as

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[3] Hudson, Article 24 of the Statute of the International Law Commission, [1950] 2 Y.B. INT'L L. COMM'N 24, 26, U.N. Doc. A/CN. 4/16 (1950).

those involving a state's treatment of its own nationals. If, for example, that treatment amounts to genocide, or even apartheid, does the contrary practice in most other states amount to a rule of law "falling within the domain of international relations"? Second, what is a "concordant" practice is not clear. Do states have to be aware that their practice is "concordant"? Third, the standard does not tell whether states must be aware that their practice is "with reference to" the type of situation suggested by Judge Hudson. Fourth, it is not established how many constitute a "number of States." Are two states sufficient, or must we have one hundred?

2. Continuation or repetition of the practice over a considerable period of time

Here the term "considerable period" is unspecified; it could range from a century to a month. The same is true for "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?

3. Conception that the practice is required by, or consistent with, prevailing international law

Here is the fundamental dilemma of custom; it is stated but not explained. It is difficult to see, moreover, how such an element helps explain "the emergence of a principle or rule of customary international law" as Judge Hudson says 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 cannot 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.

4. General acquiescence in the practice by other States

This element 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 only affecting each other, it would be hard to say the United States acquiesced in this practice, but how could it not acquiesce? A note of protest would not only be ineffective, but it also 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?

5. 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 elements. It states that international custom does not exist until a "competent international authority" pronounces it to exist. Conversely, 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, customary international law existed well in advance of the League of Nations or the Permanent Court of International Justice, even long before states bagan to have recourse to bilateral arbitral tribunals. Even apart from these considerations, "competent international authorities" are given occasion to pronounce only upon 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 summary, the late Judge Hudson's criteria appear to raise more questions than they solve. Unfortunately, however, they accurately reflect a general consensus of legal scholars who have studied the concept of custom. Hudson's elements are still quoted today by prominent scholars addressing themselves to the concept of customary international law.[4] There is thus a need for a further look at the notion of custom. Noting that serious questions have been raised as to the "adequacy and usefulness of the traditional concept" of custom, Professor Lissitzyn recently wrote of the need of a "thoroughgoing critique" of this question.[5]

THE POSSIBILITY OF A NEW THEORY

The need for an explanation of custom does not prove that an explanation is possible. Indeed, theorizing in international law is 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; and not even a nation itself remains precisely the same from one moment to the next.

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 conform their behavior to such norms. But how can we apply a psychological concept to a completely fictitious entity such as a state? Of course,

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[4] See, e.g., C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 62 (1965); H. BRIGGS, THE LAW OF NATIONS 25-52 (2d ed. 1952).

[5] Lissitzyn, Book Review, 4 COLUM. J. OF TRANSNAT'L L. 159, 161 (1965).

we may penetrate the state's veil and look to the effect of international law upon its decision-makers, but 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 is static and historically frozen, and it may be only a "pious opinion," in Sir Arthur Eddington's words,[6] that what we call "custom" is the same as what states appear to be doing in their behavioral interactions. As Professor 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 coveriations, operations, and pointer readings."[7]

Despite these difficulties, many of which are common to the social sciences in general, jurisprudence has the advantage that its operative data is itself 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 serve to indicate to him a description of 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 Professor 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.[8]

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[6] A. EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 255 (Reissue 1933).

[7] H. BLALOCK, CAUSAL INFERENCES IN NONEXPERIMENTAL RESEARCH 5 (1961).

[8] H.L.A. HART, THE CONCEPT OF LAW 86-88 (1961).

On the other hand, there are strong suggestions in the writings of Professor McDougal and his associates 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, Professor McDougal writes, "exhaust their effective power when they guide a decision-maker to relevant factors and indicate presumptive weightings."[9] In contrast, international law is "a comprehensive process of authoritative decision."[10] Despite these highly Heraclitian views of law as a description of a process, many of the essays of Professor 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 the road to an attempted theoretical resolution cannot be traversed in a few sentences or a few pages.

The temptation exists to pronounce the concept of custom as an entirely relative idea, deriving differing contents from different contexts.

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[9] McDougal & Burke, Crisis in the Law of the Sea: Community Perspectives Versus National Egoism, 67 YALE L.J. 539, 571-72n.109 (1958), in M. McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 844, 887n.109 (1960).

[10] McDougal, A Footnote, 57 AM. J. INT'L L. 383 (1963).

Dr. Zdenek Slouka recently wrote a doctoral dissertation to the effect that the role of factors affecting the emergence of a customary norm "is relative to the conditions in which those factors operate."[11] In his study, however, he examined only one instance, although in great depth, in which custom was purportedly operative. Yet theorizing in international law requires the drawing of generalizations from a number of instances. It is an inductive process, but Dr. Slouka attempted 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 that he did not examine.

The danger exists, of which Dr. Slouka's study might be an example, that in examining any one situation too closely "law" might appear to become vague, remote, and irrelevant. Facts in all their sharpness and immediacy seem to blot out the generalities of the law, 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. Thus the examination in depth of single instances contains the pitfall that the observer may be witnessing not a poor instance of conformity to the rule he has in mind but a good disconfirmatory instance of that rule leading to a new, contrary rule.

THE FRAMEWORK FOR A NEW THEORY OF CUSTOM

1. The theory must be internally consistent. This obvious requirement would appear to have been violated in the third of Judge Hudson's "elements" for the "emergence" of a customary rule. A new rule, or a change in a rule, cannot be "required by" prevailing international law.

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[11] Z. Slouka, International Custom and the Continental Shelf 307 (unpublished dissertation in Columbia Law School 1965).

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.

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

3. The theory must fit all the inductive evidence. International law, as Professor Schwarzenberger has demonstrated, is an inductive process.[12] Even when authorities say that international law is in part made up of natural law principles,[13] they are really saying 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.[14] The difficulty is that many writers purport to base their theories on what states actually do in practice and on what courts actually decide, but they occasionally overlook or dismiss certain instances that do not fit their preconceived theories. Many writers, for instance, have

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[12] G. SCHWARZENBERGER, THE INDUCTIVE APPROACH TO INTERNATIONAL LAW 8-42 (1965); see D'Amato, The Inductive Approach Revisited, 6 INDIAN J. INT'L L. 509 (1966).

[13] See Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, in SYMBOLAE VERZIJL 153, 161-68 (1958).

[14] But cf. Verdross, Jus Dispositivum and Jus Cogens in International Law, 60 AM. J. INT'L L. 55 (1966); see generally Riesenfeld, Jus Dispositivum and Jus Cogens in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court, 60 AM. J. INT'L L. 511, 514-15 (1966).

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 most important, leading case, the Lotus Case,[15] by stating that the reasoning they object to was used by the World Court "only once"[16] or "only a single time"[17] in this case among all the cases that have been brought before the Court. A more important example, perhaps, concerns the fact that most writers make no attempt to relate the rules in treaties to the process of customary law formation, 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 of all the states in order to formulate a general theory. In addition, the volume of materials that would have to be analyzed is not the only limit to the development of an inductive theory of custom. Written materials cover only a small portion of state practice. Many international claims are settled amicably in diplomatic correspondence without attracting particular notice, and these are the best instances for inducing rules of law-formation that reflect the consensus of the parties. Until these sources are indexed in information-retrieval computers, much rich material will probably remain buried.

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[15] Case of the S.S. Lotus, [1927] P.C.I.J., ser. A, no. 10 (1927).

[16] MacGibbon, Customary International Law and Acquiescence, 33 BRIT. Y.B. INT'L L. 115, 129 (1957).

[17] M. SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL 109 (1946).

4. The theory must be simple. Not only is this a general requirement in the physical and social sciences because a simpler theory is more likely to be correct,[18] but it is vital in international legal theory because states constantly use and refer to theories of law-formation as arguments in their diplomatic correspondence and state papers. International law is practical law. It is not likely to be based on theories so complex or mystical that they make the law inaccessible to the daily requirements of international claimants. Thus one reads with skepticism Torsten Gihl's argument, for example, that the psychological element in custom can only be found by the "difficult and time-consuming method" of "special researches" into the motives of governments, a method which Gihl writes is practically impossible for a court faced with an international dispute or a writer of a textbook.[19] Rather, since custom appears to be effective in international practice, it is more likely that Gihl's own concept of the elements of custom is erroneous.

5. The theory must be objectively determinable. Several prominent scholars, including Kelsen,[20] Sørensen,[21] Lauterpacht,[22] and Jenks,[23] have argued that proof of custom is a matter for the "arbitrary discretion" or "free appreciation" of courts. This is, of course, not a theory but the absence of one. It gives neither a reader nor a judge any

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[18] See Deutsch, Singer & Smith, The Organizing Efficiency of Theories: The N/V Ratio as a Crude Rank Order Measure, 9 AM. BEHAVIORAL SCIENTIST 30 (1965).

[19] Gihl, The Legal Character and Sources of International Law, 1 SCANDINAVIAN STUDIES IN LAW 51, 84 (1957).

[20] Kelsen, Theorie du droit international coutumier, 1 REVUE INTERNATIONALE DE LA THEORIE DU DROIT 253, 266 (1939).

[21] M. SØRENSEN, supra note 17, at 110.

[22] H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 378 (rev. ed. 1958).

[23] C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 263 (1964).

idea of how to proceed to find proof of custom. It is unlikely that international law would have persisted if its central idea were completely indeterminable as these writers have suggested. Hopefully, state and judicial practice should 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. There is always some room 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.[24] Indeed, this must be true for two reasons: (1) the fallability of man as an observer of external events, and (2) 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 just "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.

6. 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 ideal 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, there will be less tendency to formulate absolutistic theories and a more realistic propensity to describe a process by which the better of two conflicting claims tends to prevail. In other

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[24] A. ROSS, A TEXTBOOK OF INTERNATIONAL LAW 91 (1947).

words, two competing claimants may each have a case that falls short of fulfilling the requirements for a given theory, but the need for one claimant to prevail over the other necessitates an abandonment of that "theory" and the substitution of one that takes account of relative superiority of persuasiveness.

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, examined previously, exemplify this fallacy. Rather, any suggested theory should be examined functionally: why it is needed, how states use it, and whether it works. Indeed, this is merely another way of underlining the necessity for parsimonious induction--the formation of minimal consistent generalizations that account for the need and use of legal concepts among states.