The Content of International Law as Psychological Data

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The mystique surrounding the determination of rules of international law has acted as a barrier between the high priests of international law and social scientists who would investigate the legal aspect of international behavior. The present paper is a limited attempt to throw some light on the nature of the data that are said to constitute the evidence or proof of international norms.

Austin in 1832 raised the basic question of the meaning and validity of international law by denying that it was really "law properly so-called;" rather he labelled "positive international morality" the rules "imposed upon nations or sovereigns by opinions current amongst nations."[1] Glanville Williams in 1945, following the apparent dictates of the logical positivists, argued that the Austinian controversy was purely verbal.[2] In Williams' view, Austin was merely quarreling over a stipulated definition, an inherently fruitless task. However, Williams' position, which has gone largely unchallenged in international legal scholarship,[3] misses the basic issue, which is psychological, not verbal. The question we must ask 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." The question is, has the lack of this command-sanctions syndrome prevented nation-state officials from thinking of international law as really "law?" Clearly, on the basis of the evidence of state papers, diplomatic correspondence, arguments

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1. J. AUSTIN, LECTURES ON JURISPRUDENCE 183, 173 (5th ed. 1885).

2. Williams, *International Law and the Controversy Concerning the Word "Law,"* 22 BRIT. Y.B. INT'L L. 146 (1945).

3. *But cf.* H.L.A. HART, THE CONCEPT OF LAW 226-31 (1961); *compare* D'Amato, *The Neo-Positivist Concept of International Law,* 59 AM. J. INT'L L. 321 (1965).

in the United Nations, opinions of domestic tribunals involving questions of "international law," and even numerous national constitutions, the answer is negative. But this evidence, quantitatively impressive, is insufficient if one asks whether the nation-state officials are as 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 Professor Fuller has argued at length, insignificantly few 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, but this is also true of international law as the expression of the shared expectations of all the states. In addition, as Professor 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 obey adverse decisions for the purpose of keeping the entire legal system operating. Although some legal scholars such as Kelsen[6] (and notably Professor Tucker in a recent attempt to salvage Kelsen's text[7]) 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 postdated 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 opposite to that of Austin's and claim today that 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

4. *See* 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. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1952).

7. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW (Tucker ed. 1966).

contention could not be dismissed by arguing, along with Glanville Williams, that it is simply a matter of how one would define 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 the historical success of many of their writings in practical terms, 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, Professor McDougal makes no attempt to hide the fact 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 it is a well-known fact that 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. It is also clear that 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. But if law is viewed as a highly human endeavor, rooted in psychology and not in logical constructs, it is apparent that 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 are 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 clearly valid (to the observer) rules to other rules in the same system. As Festinger has pointed out generally, all men make the effort to avoid the cognitive dissonance that would result from making uncategorizable distinctions.[8] As 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 more difficult to separate those which the observer thinks are morally required from

8. L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1-31 (1957); *cf.* D'Amato, *Psychological Constructs in Foreign Policy Prediction,* 11 J. CONFL. RES. 294 (1967).

those which he has moral doubts about. It is far simpler to concur with other observers that all of them are "legal," and work to bring about a change in the content of those which one finds undesirable.

The foregoing jurisprudential considerations do not account for the perceived validity and efficacy of international law to the complete extent that such validity and efficacy exist in today's unsettled world. There are other, perhaps more important, psychological considerations. 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 cumulating effect; as expectations are satisfied, the notion of reciprocity is reinforced, not only to the rules in question but also to other rules in the system. Second, Professor 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 also may create a kind of reciprocity or even-handedness, in the minds of these officials, which would reinforce the idea of the rule of law. On the other hand, there are many examples of the kind of patriotism in some officials which leads them to interpret all claims, those asserted and those assessed, in light of the short-run interests of the client state. A third characteristic of international law, therefore, may be of greater importance: the fact that most of the rules of law *are* in the self-interest of the states. This has come about primarily through the operation of custom in international law, for it is hard to find better evidence of the desires of states than their customary practice in their 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 Professor Hart[10] and recently Professor William Coplin[11]—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

9. M. McDOUGAL, STUDIES IN WORLD PUBLIC ORDER 276 (1960).
10. HART, *supra* note 3, at 208-231.
11. W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 13-25 (1966).

complex, subtle, and "mature" for the very reason that it 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 reflected 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 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.

This 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 but 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 inter-tribal 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 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 Professor Henkin's words, "virtually pleaded guilty" to the violation of Soviet airspace[12]), rules relating to diplomatic personnel and embassies, and so forth. Here, as previously, the fact that many international rules support national interests and "sovereignty" has a cumulative effect for international law as a whole. Not only is there a psychological transference on the part of any given nation, but also the validity of the entire body of international rules is reinforced by the general consensus that the rules are in the subjects' best interests. This is what would make it hard for South Africa to pick and choose from the body of international rules those rules which are 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 basic importance in limiting behavior. Secondly, rules as obligations, prohibitions, or restraints upon behavior might be viewed, in Professor 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 Professor 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 policy 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

12. Henkin, *International Law and the Behavior of Nations,* 114 RECUEIL DES COURS 171, 176 (1965).

the seas" probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, or not to interfere with numerous foreign shipping or fishing activities on the high seas. More generally, it is in this sense of the term "rules" that Professor Henkin 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 felt "normative" pressure behind any given rule is a function of its acceptance as a part of the general body of international norms, of the threat of sanctions behind that particular 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, including its strategy that by following a rule it does not like, other states will behave reciprocally in the future or with respect to other current rules, and of all the other considerations previously adduced. While the felt pressure may vary from state to state and from rule to rule, probably the decisive factor is whether the rule is in fact accepted by the generality of states as part of the body of international law.

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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. There are no extra-systemic referents for ascertaining the content of international law; 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 as to what the law ought to be, he runs the risk of irrelevancy. This is not to say that the consensus of nation-state officials itself 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

13. *Id.* at 179.

14. *See* J. HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (1931); O. OTAKA, GRUNDLEGUNG DER LEHRE VOM SOZIALEN VERBAND (1932); Singer, *The Level-of-Analysis Problem in International Relations,* 14 WORLD POLITICS 77 (1961).

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 it eventually becomes technologically factual. Moreover, the consensus includes a different dimension from the ascertainment of substantive rules and tendencies. It comprises, as well, shared attitudes and expectations as to the method of determining applicable rules when the particular rules in question have not yet themselves been consciously accepted by the generality of states.

Accordingly, one may ask, how is the content of this consensus determined? Professor McDougal has suggested in a similar context that resort be had to "current social scientific techniques" such as "mass interview" and "intensive interviews."[15] This suggestion has the virtue of recognizing that the problem of the content of law is basically psychological, but there are several reasons why interview techniques cannot be decisive in this situation. In the first place, there are several difficult methodological hurdles that must be overcome. Who would be interviewed? A head of state might say one thing as to his own beliefs about 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 posits 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,

15. M. McDOUGAL, H. LASSWELL and W. REISMAN, THE WORLD CONSTITUTIVE PROCESS OF AUTHORITATIVE DECISION 117 (mimeo. 1967).

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 adjacent states. This might not be at all decisive, however, with respect to their belief in the nonexistence of such a norm, for their actions might contradict their verbalizations to our hypothetical interviewer. If such a state as a matter of its international policy behaves in such a manner as is entirely consistent with the alleged rule of adjacent state use and control of the continental shelf (for example, by not placing their own drilling rigs on any continental shelf or by altering their 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 Professor 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 a highly desirable policy to project a *res communis* policy for the shared use of all continental shelf resources; such a nation, if asked, might even say 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, there are some institutional means for registering consensus, such as resolutions in the General Assembly of the United Nations or comments on drafts proposed by the International Law Commission, but the formality of these methods tends to ensure the registration of official views of states (and not the separate views of officials within the states). In any event, such methods do not in themselves necessarily amount to "prescription," for the General Assembly does not have binding legislative powers, and the International Law Commission, in theory at least, is not supposed to recommend sharp departures from existing law.

We may even extend the preceding hypothetical case to a radical situation involving a denial by a majority of all nation-state officials, when questioned, that a given alleged rule is in fact a rule of international law. Even in such a situation, it is still possible to imagine that all the nations concerned might manifest a contrary persuasion in their actual practice. For us to determine what the operative rule of law is in such a case, we must revert to the previous argument that

16. *Id.* at 111-12.

17. M. McDOUGAL, H. LASSWELL and I. VLASIC, LAW AND PUBLIC ORDER IN SPACE 656 (1963).

international law is phenomenological at the state-perception level. Thus we might find that the policy-makers of state A firmly believe in their own minds that X is *not* a current, valid rule of international law. They may further believe that their counterparts in a number of other states do not personally 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 that it 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 the rule that is actually manifested in the practice of most states, it is therefore useless information 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, accordingly, 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. 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, articulating state actions or abstentions) of the generality of states.

If the preceding arguments are accepted, however, 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 it is his best calculation that other states are manifesting rule X in their practice. For example, the officials of a new state N might become convinced by Professor 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

18. *Id.* at 247-54.

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, it is impossible to 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.

It has been important to inquire into the possibility of discovering consensus by interviewing techniques not only for the light that this might shed upon the meaning of international law but also because more traditional methods of discovering the content of international law may involve false assumptions similar to those underlying the interviewing method. For example, the suggestion has often been made that researchers should examine unofficial sources such as inter-office 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 infirmities 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 only represent extreme positions taken for the purpose of bargaining, with an intent to settle for less 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, state papers for use in diplomatic bargaining or in adversary proceedings also may reflect this normative egocentric viewpoint. Nevertheless, these views are not necessarily what the state as a unit "believes" to be the rule of law, for the state may be prepared to act only on a lesser rule that, from its point of view, more truly reflects shared international interests.

Finally, there is a curious but widespread doctrine among publi-

cists 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 were codificatory of 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. Even if a writer were to attempt to do so, it would be very difficult, for the reasons previously adduced, 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 probably either were interested in coming up with a clear treaty rule to replace a highly ambiguous customary norm, or adopted an "extreme" view of the customary norm as a bargaining tactic to get the other side to sign the treaty.

International consensus, in brief, is something that 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. A state's decisional outputs are at least visible and enumerable, whereas the motives for its decisions are either inaccessible or fictitious. Although all "law" is basically a psychological phenomenon, international law would not have arisen nor endured if the determination of its content rested upon the penetration of the psychological motivations of national decision-makers.