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The Concept of Special Custom in International Law,
by Anthony D'Amato,* 63 American Journal of International Law, 211-223 (1969)

Abstract: *General* customary international law contains rules, norms, and principles that seem applicable to any state and not to a particular state or an exclusive grouping of states. For example, norms relating to the high seas, to airspace and outer space, to diplomatic immunities, to the rules of warfare, and so forth, apply equally to all states having occasion to be concerned with these areas. Similarly, the facts of a given case may suggest exclusively the application of general custom—such as cases concerning collision on the high seas between ships of different countries, cases involving general principles of international law, cases turning on the construction of treaties under general customary canons of construction, and in general cases where the plaintiff and defendant states could theoretically be interchanged with any other states without affecting the content of the rules of law cited by either side in the dispute. By contrast, *special* customary international law deals with non-generalizable topics such as title to or rights in specific portions of world real estate (*e.g.*, cases of acquisitive prescription, boundary disputes, and so-called international servitudes), or with rules expressly limited to countries of a certain region (such as the law of asylum in Latin America). The line separating general from special custom is similar to that in English common law, where a particular custom "must apply to a definitely limited though indeterminate class of persons" and to a limited geographic area; if the usage is laid in too wide a geographic area, for example, it is taken out of the realm of custom and must be pleaded as an ordinary claim at law.

Tags: Customary International Law, Special Custom in International Law, International Law, Asylum Case, Right of Passage Case, Norwegian Fisheries Case, Lotus Case

[pg211]** There are regrettably few cases in international law that go into the question of the proof necessary to establish a customary rule binding upon the defendant state. And from those few cases, notably those decided by the World Court, most writers have drawn pessimistic conclusions as to the proof needed for custom because of the Court's apparent insistence, in Professor Falk's words, upon "some tangible evidence of consent on the part of the state that is bound."FN1 A showing of consent is a very difficult proposition. Many legal disputes arise precisely because neither side has previously consented to the same rule. As Lauterpacht argued, to say that prior consent must be shown in order to reach a legal conclusion in any given international dispute is tantamount to rejecting the possibility of the existence of the vast majority of the rules of international law.FN2 But then, how can we explain the World Court's reasoning in the *Asylum*, *Right of Passage*, and *Fisheries* CasesFN3 in which the element of consent on the part of the defendant states seemed to play such a vital role in the Court's reasoning concerning the existence of binding rules of law?FN4

The purpose of this essay is to argue that the widely accepted view of the World Court's jurisprudence as emphasizing the requirement of a [pg212] showing of consent is a mistaken view, not because scholars have misread the cases but rather because of a widespread failure to draw a basic distinction between special (or "local" or "particular") customary international law and general customary international law. The cases just cited, which shall be examined shortly, dealt with special, not general, custom. The stringent requirements of proof of consent in these cases thus do not apply to the large body of general norms of international law binding upon all states, but rather apply only in similar cases of "special" custom.

I. THE TWO TYPES OF CUSTOM

The distinction between special and general custom is conceptually simple. General customary law applies to all states, while special custom concerns relations between a smaller set of states. As Professor McDougal has put it, "some prescriptions are inclusive of the globe; other prescriptions recognize self-direction by smaller units."^{FN5} An analogous instance might be conventional international law: since no treaty to date has been signed by each and every state in the world, a given treaty is an explicit manifestation of consent by a group of states smaller than the totality of states. Professor Lissitzyn has vividly written that

the "particular" international law ... created by treaty could be visualized as consisting of a vast and ever changing number of circles of different and often fluctuating sizes, each enclosing a special "legal community" composed of the parties to a treaty.^{FN6}

General customary international law contains rules, norms, and principles that, even upon mere inspection, seem applicable to any state and not to a particular state or an exclusive grouping of states. For example, norms relating to the high seas, to airspace and outer space, to diplomatic immunities, to the rules of warfare, and so forth, apply equally to all states having occasion to be concerned with these areas. Similarly, the facts of a given case may suggest exclusively the application of general custom--such as cases concerning collision on the high seas between ships of different countries, cases involving general principles of international law, cases turning on the construction of treaties under general customary canons of construction, and in general cases where the plaintiff and defendant states could theoretically be interchanged with any other states without affecting the content of the rules of law cited by either side in the dispute. By contrast, *special* customary international law deals with non-generalizable topics such as title to or rights in specific portions of [pg213] world real estate (*e.g.*, cases of acquisitive prescription, boundary disputes, and so-called international servitudes), or with rules expressly limited to countries of a certain region (such as the law of asylum in Latin America). The line separating general from special custom is similar to that in English common law, where a particular custom "must apply to a definitely limited though indeterminate class of persons" and to a limited geographic area; if the usage is laid in too wide a geographic area, for example, it is taken out of the realm of custom and must be pleaded as an ordinary claim at law.^{FN7}

The bifurcation of special and general custom is rooted in Roman law and English common law. As the Roman Empire expanded, centrally enacted legislation was extended in its applicability to outlying communities and to the *peregrini* (foreigners within the Empire). Such statutes of necessity pre-empted local law and customs to the contrary. Yet Roman law recognized the force of a principle known as desuetude: that the centrally enacted legislation could actually be canceled by virtue of lack of application and enforcement in a given community over a period of time.^{FN8} The statute stayed on the books, of course, and its cancellation applied only to the particular communities in which it was not enforced. This particular desuetude of a statute thus amounted to a negative special custom in favor of the relevant communities.^{FN9}

In English common law, Blackstone summed up the historic distinction between the two types of custom:

general customs, which are the universal rule of the whole kingdom, and form the common law . . . [and] particular customs, which, for the most part, affect only the inhabitants of particular districts.FN10

The former are determinable, according to Blackstone, by the application of experience, study, and the following of precedents.FN11 In sharp contrast are the rules for proving special custom. The rules are strict, Blackstone writes, because they are (or can be) in derogation of the common law or general custom.FN12 Thus, special customs must be specially pleaded, must be proved by a jury, must have been in use a long time, must have been non-contentious, continuous, reasonable, certain, and internally consistent.FN13 The common law also required in many cases a showing of *opinio juris* (that the custom was observed as a matter of right) and that it was notorious (the defendant being expected to have [pg214] known of it).FN14 It is certainly clear that the vague and flexible rules given by Blackstone for the determination of general custom were quite unlike the difficult burdens of proof that would have to be met to win a case based on special custom.

II. THE IMPORTANCE OF THE DISTINCTION

Many scholars, including Professor Falk cited at the beginning of this essay, have expressed deep pessimism about the World Court's contribution to the growth of international law due to the Court's alleged insistence on proof of consent before a defendant state can be bound. A recent strongly worded statement of this position may be found in Dr. Wilfred Jenks' book, *The Prospects of International Adjudication*. Dr. Jenks cites the World Court's statement in the *Anglo-Norwegian Fisheries Case*:

the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.FN15

Assuming that the Court is dealing at this point with general custom finds in the Court's language a rule of proof of custom that, in his words,

may appear to verge upon the extreme positivist position that no State is bound by custom in the absence of proof of its own recognition of the alleged custom in deference to an *opinio juris sive necessitatis*. This position involves a frontal challenge to any possibility of the development of international law by means of international adjudication.FN16

Seeing no reasonable alternative to his own reading of the language of the Court in the *Fisheries Case*, Dr. Jenks proceeds to disparage the Court, the case, and international law in general. He labels international law "primitive," in an attempt to excuse the *Fisheries* result.FN17 Second, he suggests that decisions such as the *Fisheries* decision may simply have to be changed by states in their international practice by a good deal of law-breaking, if not violent, activity, since recourse to the Court is obviously a barrier to progress.FN18 Third, he cites long extracts from the dissenting opinions in the case, all of which take on a far harsher tone out of context than they might to a reader who has first read the Court's majority opinion in its entirety. Finally, Dr. Jenks pleads that the Court should exercise in the future much more discretion in matters of finding custom.FN19 He [pg215] would have the Court avoid adducing evidence of custom which "in the nature of the case it may frequently be impossible to furnish."FN20

It would seem that all of these alternatives proposed by Dr. Jenks would reduce, and not advance, his avowed purpose of promoting recourse to international adjudication. Calling international law "primitive" does not encourage states to seek authoritative determinations of the rule of law from international courts, and in any event is a completely irrelevant observation even if true. Suggesting that states may have to resort to force to make progress in the teeth of reactionary decisions such as that in the *Fisheries Case* is similarly unhelpful. The citation of long passages from dissenting opinions is a dangerous and misleading practice for any scholar in any legal system, for the court obviously was aware of these dissents when it reached its decision and usually deals with them in the way the majority opinion is organized and written. In context, dissents can throw light on the interpretation of the majority opinion, but out of context they may appear to be disjointed polemics. In international law in particular, the lack of compulsory jurisdiction and centralized enforcement procedures make it very difficult for an international tribunal to reverse itself or to depart from its own precedents in future cases, for most of the court's authority depends upon the soundness and consistency of its reasoning. Thus, dissenting opinions carry less weight in international law (unlike the Holmes-Brandeis dissents as predictors of changes in later American Constitutional law), and international scholars should accordingly refrain from citing such dissents just because they feel that the dissents are more persuasive than the majority opinions. Finally, Dr. Jenks' plea for more discretion by the Court in finding custom can hardly promote greater recourse to the Court by states in the future. No state wants to submit to adjudication of its disputes when the result is completely unpredictable, yet the greater the discretion used by the Court in finding custom the greater becomes the unpredictability of its decisions.

Clearly, a plea for greater discretion in the finding of customary rules of law is a step backward from the idea of law as a science of prediction giving nations advance notice of the legal propriety of their contemplated actions. Dr. Jenks' conclusions therefore reinforce the importance of re-reading and re-analyzing the crucial decision in the *Fisheries Case* and other key cases dealing with customary international law. The next section accordingly is an attempt to argue that these cases were not cases of general customary law at all, and that therefore the Court's insistence on a showing of consent that Dr. Jenks found so objectionable applies only to the limited class of similar cases of "special" custom.

III. WORLD COURT CASES ON SPECIAL CUSTOM

Professor Briggs has emphasized the World Court's reasoning in the *Asylum Case* as "admirably illustrat[ing] how international customary [pg216] law in general is proved," FN21 and Judge De Visscher said that the decision "fixes [the Court's] jurisprudence on this subject." FN22 However, the Court in that case was *not* dealing with customary law in general, but rather with special custom. One passage, quoted by many writers, contains the essence of the Court's reasoning. The Court began by referring to the reliance by the Colombian Government "on an alleged regional or local custom peculiar to Latin-American States." The Court then held:

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty

incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."FN23

The Court then proceeded to find no evidence of a constant and uniform usage in the matter of diplomatic asylum in Latin America, due to the uncertainty, contradiction, fluctuation, discrepancy, and political expediency in the various cases and instances on the subject. Moreover, it held that Peru had "repudiated" the Montevideo Conventions of 1933 and 1939 (which contained the rule Colombia was contending for) by its failure to ratify those conventions.FN24

Since there was no proof of "a custom of this kind," the Court denied Colombia's plea of "an alleged regional or local custom." It is of fundamental importance to note that the Court used the arguments in the preceding paragraph solely with respect to this "local custom." A reading of what came before this section in the Court's opinion shows that the Court also considered matters of general custom, including treaty interpretation, yet nowhere in discussing those matters did the Court require a showing of the strict elements of special custom just quoted. For example, the Court discussed the concept of "derogation from territorial sovereignty" without referring to constant and uniform practice or explicit rights and duties.FN25 Also, in dealing with treaty interpretation, there was no reference to the strict elements of special custom. Rather, these elements were restricted to the section of the opinion where the Court explicitly dealt with "an alleged regional or local custom" or, in other words, special custom.

Additional support for the preceding interpretation may be found in the dissenting opinion of Judge Alvarez which highlights the Court's particular concern with the matter of a special custom in Latin America FN26 and also in the majority opinion in the later case of the *Nationals in Morocco*. This case dealt with many separate contentions relating to [pg217] matters of general custom and treaty interpretation, but also with a special question of specific American capitulatory rights in Morocco. It was only with respect to this latter issue that the Court cited its earlier statement in the *Asylum* Case on special custom.FN27 Moreover, it introduced the citation by a qualification that the Court's language in the *Asylum* Case on this point dealt with "the question of the establishment of a local custom peculiar to Latin-American States." FN28

The portion of the *Nationals in Morocco* opinion dealing with capitulatory rights, by citing the *Asylum* Case on special custom, provides us with a good example of special customary law. For there is clearly no general rule of international law granting all states extraterritorial rights in other states. If among any particular states extraterritorial rights exist, they either stem from a treaty or from special customary practice that amounts to consent on the part of the territorial state. Perhaps the only general rule on the subject in present international law may take the form of a presumption, or pressure, against the existence of capitulatory rights, an "old and dying institution" in the words of Professor Verzijl.FN29 The manner in which the Court analyzed the rights of the parties in the *Nationals in Morocco* Case lends support to this interpretation. There was no finding of a rule of general customary law in behalf of the United States' claim to extraterritorial rights in Morocco. And the citation of the *Asylum* Case, with its restrictive view of the necessary elements for proving the existence of a "regional or local custom," indicates that with respect to certain kinds of subjects, such as capitulatory

rights, the plaintiff must prove in a very specific way that the defendant has expressly or impliedly consented to the alleged "derogation from [its] territorial sovereignty."FN30

Nor are the preceding interpretations invalidated by the Court's reference to Article 38 in the *Asylum* Case, quoted previously, and again in the *Nationals in Morocco* Case when the Court quoted its own prior language. To repeat the quotation, the Court held that the elements of special custom follow from the reference in Article 38 of the Statute of the Court to international custom "as evidence of a general practice accepted as law." At first impression, the word "general" in this clause might appear to be inconsistent with a finding of special custom. But historically the apparent discrepancy is easily resolved. In 1936 Professor Basdevant pointed out the need for a broad interpretation of Article 38 to include special custom.FN31 Such an interpretation was necessary in order to fulfill the reasonable expectations of states who often order and regularize special relationships among themselves in the manner discussed previously. The World Court must have agreed with Professor Basdevant's reasoning, even before 1936, since it has refrained entirely from mentioning Article [pg218] 38 in all of the numerous cases involving general custom, while mentioning it explicitly in the portions of the *Asylum* and *Nationals in Morocco* Cases dealing exclusively with special custom. In so doing, the Court has fixed upon Article 38 the broad interpretation called for by Professor Basdevant. Additionally, to make the matter crystal clear, the Court stated in the *Right of Passage* Case:

[I]t is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.FN32

Thus, to the extent that the Indian representative had contended, in pleadings that were not always models of clarity, that "customary international law" could not apply in this case, the Court set the record straight by showing, in the passage just quoted, that this was not a matter of general customary law affecting a large number of states but rather a matter of "local custom" exclusively regulating the particular rights and obligations between Portugal and India.

Let us consider this case more closely. In it the Court held that Portugal had a right of passage over Indian territory with respect to private persons, civil officials, and goods in general, for the purpose of reaching the Portuguese enclaves in India.FN33 The International Court's holding was based on evidence of a local custom, continuous over a period exceeding a century and a quarter, "accepted as law" by the parties, and constant and uniform. This case, according to Professor Wolfke, contains "the most decisive recognition of particular customary rules, as opposed to general customary rules."FN34 The Court went on to reject other alleged rights also on the basis of special custom. It found no special custom entitling Portugal to transport armed forces, police, or ammunition over Indian soil.FN35 Thus the heart of the case concerned special custom as the secondary rule of law-determination with respect to the bundle of alleged rights of passage.

An entirely new section of the Court's opinion, preceded by an asterisk break deals with the parties' arguments on general custom. With respect to the non-military right of passage, the

Court held it superfluous to inquire whether general custom would yield the same result as special custom. As to the alleged military right, the situation was more complex. Portugal did not advance any convincing arguments either in the briefs or in the oral presentation that a right of military access existed under general customary international law. Much of the argumentation consisted of analogies to municipal law granting access to private persons over the land of another, but these did not involve military access.

[pg219] Therefore, since the Court was able to find a distinction in the special customary practice between Portugal and India as to non-military and military rights, it refused to deal with the alleged general custom of military access. The Court noted that the situation was "a concrete ease having special features," that the practice between the two states was "clearly established," and that therefore "such a particular practice must prevail over any general rules." [FN36]

Thus the Court in the *Right of Passage* Case clearly distinguished between special custom and general custom in international law. However, it was not so clear as to which type of custom would have priority in the event of a clash. For its assertion of the primacy of special custom in this case was made possible largely by the absence of any convincing demonstration by Portugal of a general custom of military access to enclaves. Moreover, the Court would not have argued the superfluity of examining Portugal's contention of general custom with respect to non-military access if it could have disposed of this point simply by stating that special custom in all cases preempts general custom. It is obviously too early in international jurisprudence to state with any degree of conviction clear "conflict-of-law" principles with respect to special and general custom. The *Right of Passage* Case seems to suggest that when special custom is easily proved and general custom on the other hand is vague and dependent upon analogies to situations which are not directly in point, the Court will accept the former and not make any particular effort to inquire into the latter. This is, of course, an elusive relationship, to say the least, but even more elusive ones are possible. Thus, in the *Nationals in Morocco* Case, there may have been hovering in the background a rule or principle of general customary law to the effect that capitulatory rights are, or ought to be, construed narrowly if at all. This general customary prescription may have made it harder for the United States to prove the existence of a special custom establishing such a capitulatory regime. Conversely, it is not difficult to imagine a rule of general customary law that makes it easier to establish specific bilateral relationships. Thus, although all the instances of claim-conflicts with respect to alleged submarine rights on the continental shelf prior to the 1958 Geneva Convention involved specific parties making specific claims, the coastal state consistently had the better claim due, arguably, to the existence of a general rule of coastal state rights over the continental shelf that was simultaneously emerging.

Another possible relationship between general and special custom might be that when the former is too vague to cover a specific ease area (even though it could clearly apply to different cases), a decisive role might be played by special custom when otherwise special custom would not be invoked at all. This seems to have occurred in the complex case of the *Anglo-Norwegian Fisheries*. The Court's opinion is not easy to analyze; Douma lists over fifty articles devoted to the case, offering conflicting [pg220] interpretations. FN37 The opinion is rambling and cryptic, possibly reflecting the fact that the judges deliberated only fifty days

despite the voluminous pleadings and lengthy oral arguments.FN38 It has been severely criticized,FN39 particularly by losing counsel.FN40 Yet if the opinion is read in its entirety, taking all the passages together and in context, a rational scheme becomes evident.

The most important parameter in the Court's judgment is that Norway's delimitation of its territorial waters must accord with general international law:

The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.FN41

The Court then gave three indications of the requirements of general customary international law in this area: (a) "the drawing of base-lines must not depart to any appreciable extent from the general direction of the coast";FN42 (b) if the coastline is unusually rugged, the choice of base-lines should be "liberally applied";FN43 and (c) as a general principle "governing any delimitation of the territorial sea," the "base-lines must be drawn in such a way as to respect the general direction of the coast and ... must be drawn in a reasonable manner."FN44 That these are all statements of general customary rules is evident from the fact that the Court simply takes judicial notice of them, with no attempt to offer independent proof. It is moreover important to note that, although the statements may not offer precise guidelines in close cases, they certainly rule out arbitrary and excessive claims and thus serve the function of any general rule of law in indicating broad standards of permissible conduct.

The opinion also contains statements of general custom for which the Court does offer or allude to evidence of state practice. An example is the statement that for the purpose of measuring the breadth of the territorial sea "it is the low-water mark which has generally been adopted in the practice of States."FN45 There are also instances of *alleged* general rules which the Court found not to be accurate statements of international law. The most important example of this was Great Britain's claim that, to be considered as internal waters, a "bay" may not have, under general customary law, a closing line of its indentation that exceeds ten sea miles. But the Court held that

[pg221] although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.FN46

It is within the parameters of the preceding formulations of general customary law that the Court considers matters of special custom. One large class of instances of special custom occurring in different places throughout the opinion is the matter of "historic waters." These are, of course, instances of prescription. As Judge Fitzmaurice has analyzed the matter,

the acquisition of a historic right by prescriptive means is merely a special case of the creation of right by custom or usage.FN47

In such an instance,

the element of consent, that is to say, acquiescence with full knowledge, on the part of the [complaining] State is not only present, but necessary, to the formation of the right."FN48

Indeed, Great Britain did not contest the validity of prescriptive rights, conceding that the "historic waters" belonged to Norway if *possessio longi temporis* was proven in each instance.FN49

Some other examples of special custom in the Court's opinion have caused considerable trouble for critics of the case who have not distinguished between the two types of custom. First, we have already seen that the Court rejected the ten-mile rule for bays as far as *general* customary law was concerned. But then the Court added an argument addressed specifically to the two parties in the litigation:

In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.FN50

In short, the Court considered the ten-mile rule both in general and in special custom. It upheld Norway on the general ground because of the division of state practice throughout the world. And it upheld Norway on the special ground because, as between Norway and Great Britain, Norway had not consented to the practice (indeed she opposed it). Here the Court was in effect saying that Norway's delimitation of bays was not unreasonable in light of general customary practice, and therefore Great Britain could not *limit* Norway's rights within the ambit of reasonableness unless Norway consented to the establishment of such a special custom.

[pg222] But if Norway has certain rights within the ambit of reasonableness, Great Britain may also have similar rights. For if a certain area is contested, one cannot say *a priori* that the coastal state and not the state that is attempting to fish in the area has the better preemptive claim to whatever may reasonably be claimed. Thus it became relevant to see if Great Britain had consented or acquiesced to Norway's use of any part of the area defined by the general customary rules previously stated by the Court. Thus, as a second example of special custom, and with respect to the questions of the ten-mile rule, the historic waters, and their applications to the "*skjaergaard*" and other specific configurations of the Norwegian coast, the Court took specific account of the notoriety of the Norwegian claims and the failure of Great Britain to engage in substantial protest:

The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.FN51

This language, coming near the end of the Court's opinion, points up the Court's concern for the special aspects of the bilateral relationship between Norway and the United Kingdom.FN52 It would be a mistake to apply to general custom the Court's reasoning on toleration and lack of protest, for these served a specific purpose relating to consent in the matter of special customary rights within the disputed ambit of the reasonable possible extensions of Norway's internal waters.

To round out the practice of the World Court, two additional cases, other than those dealing with acquisitive prescription,^{FN53} may be briefly mentioned. In 1927 the Court dealt with the question whether the European Commission of the Danube had jurisdictional powers over navigation of the river from Galatz to above Braila.^{FN54} The Court looked to "usage [pg223] having juridical force simply because it has grown up and been consistently applied with the unanimous consent of all the States concerned."^{FN55} This was clearly a matter of special custom, inasmuch as the case was about a specific commission for a specific river; no one has ever suggested the existence of a general rule setting up river commissions and giving them precise jurisdictional powers. Hence the idea of "unanimous consent" was restricted to a situation of special custom. Similarly, in 1930 the Court delivered an advisory opinion concerning a specific place—the Free City of Danzig. It based its holding that Poland did not have absolute rights regarding the conduct of the foreign relations of Danzig on a

practice which seems now to be well understood by both Parties ... [that] gradually emerged from the decisions of the High Commissioner and from subsequent understandings and agreements arrived at between the Parties under the auspices of the League.^{FN56}

Again, the attempt to show consent was necessary in a situation of special custom.

The cases just examined do not afford a complete picture of the requirements for proving special custom in international law. Indeed, it is possible that the requirements may change, depending upon the type of case involved—whether it is a case of prescription, or boundaries, or regional law, or whatever.^{FN57} In this area, as in so many others in international law, the richest collection of evidence—diplomatic correspondence among nations—has hardly begun to be tapped in any systematic way. New methods in the social sciences, particularly the content analysis of documents ^{FN58} combined with statistical factor analysis of the relevant components of decision and conflict resolution,^{FN59} may offer a way to mine these resources of state practice.

But apart from the problem of the refinement of criteria for special custom, the most significant conclusion to draw from the preceding analysis is that special custom should be sharply distinguished from general customary law. The particular problems of proving consent on the part of the defendant state in any claim-conflict situation that are associated with a claim of special custom need not be extended to the broader question of norms of general custom, at least insofar as the World Court's cases are concerned. An important analytical step forward can be taken if the problem of the proof of general custom is seen to be an entirely separate question from the problem of proving the requisite consent for special custom.

Footnotes

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**Numbers in the format [pg211] etc. refer to the pagination of the original publication.

FN1 Falk, "On the Quasi-Legislative Competence of the General Assembly," 60 A.J.I.L. 782 (1966).

FN2 Lauterpacht, *The Development of International Law by the International Court* (1958).

FN3 *Asylum Case*, [1950] I.C.J. Rep. 266; *Right of Passage Case*, [1960] *ibid.* 4; *Fisheries Case*, [1951] *ibid.* 116.

FN4 *The Lotus Case*, P.C.I.J., Ser. A, No. 10, at 4 (1927), cited by Professor Falk, note 1 above, at 784, to support his argument that the World Court relies even in cases of general custom on a showing of consent, does not, upon closer inspection, stand for that proposition. The Court in that case held that "the rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law. . ." (at p. 18). Far from being a statement that each particular state must consent to each particular rule alleged to be binding upon it, this language indicates that the Court had in mind *aggregate* consent. It accords with Professor Jaffe's statement that "consent is given to international law as a system rather than to each and every relationship contained in it." Jaffe, *Judicial Aspects of Foreign Relations* 90 (1933). For evidence in the *Lotus Case*, the Court did not look only to situations in which Turkey had consented to a rule of law, but rather considered four municipal law cases involving collisions (which were, as it happened, divided evenly on the relevant rule), none of which involved either Turkey or a Turkish vessel. This demonstrates that the Court was not looking for individual consent by Turkey to the rule alleged by France, the plaintiff state.

FN5 McDougal, *Studies in World Public Order* 15 (1960). The term "general" is more commonly used than the word "universal" and avoids the latter's complications arising from a single recalcitrant state or a self-declared international-outlaw state. As stated by Justice Chase in the classic case of *Ware v. Hylton*, "general" international law is "universal" and thus binding upon "all nations." 3 Dall. 199, 227 (1796).

FN6 Lissitzyn, *International Law Today and Tomorrow* 7 (1965). There may also be subclasses within the smaller group; *e.g.* two states within a region may make a treaty applying only to themselves that derogates from the regional rule.

FN7 Salt, "The Local Ambit of a Custom," in *Cambridge Legal Essays* 279, 283 (1926).

FN8 See Buckland, *A Text-Book of Roman Law* 52 (2nd ed., 1950); Jolowicz, *Historical Introduction to the Study of Roman Law* 363-364 (2nd ed., 1961).

FN9 *Desuetudo* is the verbal opposite of *consuetudo* (custom). *Cf.* Kelsen, *General Theory of Law and the State* 119 (1945).

FN 10 Blackstone, *Commentaries* *67.

FN 11 *Ibid.* at *69-70.

FN12 An example of such a special custom is that of *gavelkind* in Kent, that all sons alike succeed to the father's estate. This is in derogation of the general customary rule of primogeniture. *Ibid.* at *74-75.

FN13 *Ibid.* at *78-78. See Braybrooke, "Custom as a Source of English Law," 50 Mich. Law Rev. 71 (1951).

FN14 Salmond, *Jurisprudence* 264 (9th ed., 1981); Allen, *Law in the Making* 136 (3d ed., 1939). To the extent that Blackstone had a concept of *opinio juris*, he thought of it as part of the meaning of custom and not as an independent determinant of custom. The concept of *opinio juris*, however, has taken on a life of its own in international law, stemming largely from the misapplication of Geny's use of the term in his famous *Methode d'interpretation et sources en droit privé positif* §110 (1899).

FN15 [1951] I.C.J. Rep. 116, at 131.

FN16 Jenks, *The Prospects of International Adjudication* 237 (1964).

FN17 *Ibid.*

FN18 *Ibid.* at 261.

FN19 *Ibid.* at 263.

FN20 *Ibid.* at 264.

FN21 Briggs, "The Colombian-Peruvian Asylum Case and Proof of Customary International Law," 45 A.J.I.L. 728, 730 (1951).

FN22 De Visscher, *Theory and Reality in Public International Law* 148 (1957).

FN23 [1950] LC.J. Rep. 266, at 276-277.

FN24 *Ibid.* at 277.

FN25 *Ibid.* at 274-275.

FN26 *Ibid.* at 290-302.

FN27 [1952] I.C.J. Rep. 176, at 199-200.

FN28 *Ibid.* at 199.

FN29 2 Verzijl, *The Jurisprudence of the World Court* 135 (1966)

FN30 [1950] I.C.J. Rep. 266, at 274-275.

FN31 Basdevant, "Règles générales du droit de la paix," 58 Hague Academy, Recueil des Cours 471, 486 (1936).

FN32 [1960] I.C.J. Rep. 4, at 39.

FN33 *Ibid.* at 40.

FN34 Wolfke, Custom in Present International Law 90 (1964).

FN35 [1960] I.C.J. Rep. 4, at 43.

FN36 *Ibid.* at 44.

FN37 Douma, Bibliography of the International Court of Justice, including the Permanent Court, 1918-1964, at 203-207 (1966).

FN38 Hudson, "The Thirtieth Year of the World Court," 46 A.J.I.L. 1, 25-26 (1952).

FN39 See Jenks, *op. cit. note* 16 above, at 247-251.

FN40 See Waldock, "The Anglo-Norwegian Fisheries Case," 28 Brit. Yr. Bk. Int. Law 114 (1951).

FN41 [1951] I.C.J., Rep. 116, at 132.

FN42 *Ibid.* at 133.

FN43 *Ibid.*

FN44 *Ibid.* at 140-141.

FN45 *Ibid.* at 128.

FN46 *Ibid.* at 131.

FN47 Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 Brit. Yr. Bk. Int. Law 1, 39 (1953).

FN48 *Ibid.* at 68-69.

FN49 [1951] I.C.J. Rep. 116, at 130.

FN50 *Ibid.* at 131.

FN51 *Ibid.* at 139. This language resembles a traditional test of estoppel in domestic law. For a recent doctoral dissertation contending that customary international law is nothing other than a form of estoppel, see Slouka, *International Custom and the Continental Shelf* (unpub. dissertation, Columbia U., 1965). A difficulty with such a thesis is that international customary law itself in the final analysis gives content to the notion of estoppel in international law to the extent that the latter may be operative. Thus only a verbal substitution, that of "estoppel" for "custom," is effected, but there is no gain in explication.

FN52 It is conceivable that a different plaintiff state might prevail against Norway on the same issues, as several writers have suggested; it is perhaps more likely, that the Court's reasoning would not be extended to coastal situations involving future defendants other than Norway.

FN53 For an instance of special custom in a prescriptive setting, see the *Minquiers and Ecrehos Case*, [1953] I.C.J. Rep.47. For a brief discussion of the *Lotus Case*, see note 4 above.

FN54 *European Commission of the Danube, Advisory Opinion*, P.C.I.J., Ser. B, No. 14, at 6 (1927).

FN55 *Ibid.* at 17.

FN56 *Free City of Danzig, Advisory Opinion*, P.C.I. J., Ser. B, No. 18, at 4, 12-13 (1930).

FN57 Special custom in Latin America seems to have its own rules. See Judge Alvarez' dissenting opinion in the *Asylum Case*, [1950] I.C.J. Rep. 266 at 290-302. See also G. Cohen-Jonathan, "La Coutume locale," 7 *Annuaire francais de droit int.* 119 (1961).

FN58 See, *e.g.*, North *et al*, *Content Analysis* (1963).

FN59 See, *e.g.*, Rummel, "Understanding Factor Analysis," 11 *J. Conflict Resolution* 444 (1967); *cf.* D'Amato, "Psychological Constructs in Foreign Policy Prediction," *ibid.* at 294.