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What 'Counts' as Law?

Anthony D'Amato

Northwestern University School of Law, a-damato@law.northwestern.edu

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Abstract: A reader of jurisprudence might conclude that only philosophers raise the question whether international law may be said to exist or is really law. But in terms of frequency, the question is probably raised more often by governments and states that are not trying to be philosophical. The increasing attention being paid to the need for, and the procedures for, objective validation of rules of international law in a burgeoning literature of international law evidences the seriousness of the problem, the responsibility of scholars for careful scholarship in this area of legal theory, and ultimately the good possibility of generally accepted standards for that kind of objective validation.

Tags: International Law, Jurisprudence, Naturalism, Positivism

BASIC PREMISES AND BUILDING BLOCKS

The Term Law in the International Arena

[pg83]* A reader of jurisprudence might conclude that only philosophers raise the question whether international law may be said to exist or is really law. But in terms of frequency, the question is probably raised more often by governments and states that are not trying to be philosophical. Hitler might have had genuine doubts whether his plans for aggression and territorial aggrandizement were contrary to law, and if told they were contrary to international law he would have felt the same urge to deny the meaning of the term "international law" that other heads of state have felt when purported legal rules stood in the way of their policies. Since Hitler died before the international legal prohibitions against unjustified aggression were actually enforced against individuals at Nuremberg, he may have gone to his death thinking that he had done nothing illegal. But did those legal rules depend upon subsequent "enforcement" before they could claim "the title law"?FN1 In what sense can we divorce law from its subsequent enforcement?

To begin at the most basic level possible, let us consider the categories of possible *words* that can be used to change or modify human behavior. We start with any person who has a choice, who can pick one of two courses of action or who can decide whether to go ahead or not to go ahead with one potential course of action.FN2 Certain kinds of words or messages can be communicated to him that might influence his choice. Someone might say, for example, "Plan A would be right but plan B would be immoral." That assertion might be backed up with arguments appealing to all kinds of sources, particularly the would-be actor's, that might give content to the meaning of morality. A second kind of message might be, "If you do A, my friends and I will help you; but if you do B, my friends and I will punish you." This threat of sanction, which may have no moral content, can effectively influence the actor providing that he is persuaded of the likelihood, credibility, and severity of the threat. A third type of message, at first glance quite different from those involving morality or physical sanction, is "If you do A you will be acting legally, but if you do B you will violate the law." Accompanying *this* [pg84] message will be arguments showing that A is indeed legal under the rules of law acknowledged by the actor and B is illegal. FN3

Is the legal message different in kind from the moral message or the sanctions message? Certainly we might postulate a purely imaginary society where the mere invocation of the term *law* is enough to channel all behavior in legal directions. In such a society no one has any intention of violating the law provided information is given as to what courses of action are illegal, and hence there are no violations of law and no enforcement machinery (police, prisons, etc.) Human society probably will never reach such a system, but surely we cannot deny the title "law" to the rules of that system simply because there is no need for enforcement. Nor can we insist that the rules are necessarily rules of morality as we understand the latter term, because my brief description of the imaginary system is complete without reference to the content of their rules. But now, descending to earth and taking human nature as it is, must the legal message have components that are also moral and physically enforceable? Natural-law theorists insist law is close to morality while positivists insist that it is close to "that which is enforced."FN4 How close? How necessarily close? These are questions which would take more space to deal with than is available here. We do not have to ask these particular questions to work out an understanding of the term *international law* for the purposes of this volume. Yet we have some guidelines, at least psychologically if not philosophically, for the interpretation of the legal message in terms of either the moral message or the sanctions message.

If rules of law were consistently at odds with generally understood rules of morality or justice, soon "cognitive dissonance"FN5 would intrude to vitiate the influence that the legal message would have upon our conduct. If we live in a system of immoral laws, we will spend our time thinking of ways to act illegally and subvert the system so as to establish a new system where the new laws will be entitled to respect. Surely a system of immoral laws will not last long if there is a psychological dissonance between its rules and those of morality. But now one can argue: what if the immoral laws are strictly and brutally enforced? This brings us to the positivist assertion of the interdependence between law and sanctions. But let us hold for a moment the case of enforcement of *immoral* laws, and consider first the relation between law and sanctions where we do not add the complexity of whether the rules are moral or immoral.

Let us now imagine another strange and purely imaginary society: a dictator has recently taken complete control over the military and police, and he announces that he [pg85] will enforce his own wishes whatever they will be and whether or not they are legal. He cares nothing for the legal system as it exists in the country prior to his take-over, and he will neither attempt to change nor enforce it. He then engages in a series of actions, some of which he openly admits are illegal, such as condemning for his own use without paying for it a large house owned by a private citizen and a swimming pool owned by a private corporation. Since he controls the police and the army, private resistance is futile. Perhaps he even enjoys admitting that his actions are illegal, since that gives him a greater sense of power. Now, could we argue that his actions are not illegal because he controls the physical power of the state? If so argued, we would be contradicting the express conclusion of both the dictator and all his subjects. We would find ourselves, on the outside of that society, adhering to a definition of legality that is at variance with that of everyone in the society. Quite the contrary, it makes perfect sense to claim that, although the dictator can get away with it because he controls the state's enforcement machinery, his illegal actions are not suddenly made legal because of that control any more than a criminal's theft is made legal because he got away with it. Yet, having said this much, we must also predict

that in a short period of time that society will experience a cognitive dissonance between rules of law and morality. Every parent knows that in teaching certain rules to children (such as the rule "Don't play in the street") the rule occasionally must be enforced, so as to make it stick. Otherwise the child will begin to disregard those rules that the parent sees the child violating but does nothing about. Yet it is not necessary that the parents enforce every rule, so long as the rules are clear, obeyable, and subject to enforcement. The authority of the rules will erode if they are not enforced more or less consistently. When the opposite of certain rules are enforced, at first one might conclude that the enforcement is illegal but later one might conclude that it is the opposite of the rules that truly constitute the law. Thus, the dictator's actions at first will be perceived to be illegal; after a period of time people will begin to wonder if they will not be better off if they recognize that the rules that the dictator enforces are those that are truly rules of law and the rules he is apparently violating are only the old rules of the pre-dictator regime.

Applying the preceding example to the case of enforcement of immoral laws, we can now see that if a system of immoral laws is systematically enforced, the people will be caught between two conceptions of law. On the one hand they will be reluctant to recognize the claim that they *ought* to obey the law in a moral sense, but on the other hand they will have to concede that there is no conflict between the asserted rules of law and the enforced rules. Surely this system will persist somewhat longer than one where the laws are simply immoral but there are no sanctions for disobeying them. Yet, the seeds of revolution must exist in the system, for the people will resent the enforcement of immoral laws even more than they would resent immoral laws that are not enforced. (Of course, the opposite is possible: the people may begin to *learn* a new standard of morality by virtue of repeated applications of legal rules that are enforced, but we are here dealing only with the assumption that in a given system laws are perceived as immoral and continue to be so perceived.)

Thus, we have some conclusions to draw from the above examples which are not necessarily rigid as a matter of philosophy but rather seem to be dictated by basic psychological observation. A legal system might exist at any moment in time that is totally divorced from moral standards, but it will probably not last long; similarly, it is hard to imagine how it came to exist in the first place since rules of law tend to evolve from moral considerations.FN6 Similarly, a legal system might exist at any moment in time [pg86] that is totally divorced from what the state will enforce, but over the longer run an accommodation will set in between what is legal and what is enforced. Yet it is no test of any individual law that it must be enforced to be a law. The international law against unjustified aggression existed in 1939 even though it wasn't going to be enforced until 1946 and even if it hadn't been enforced in 1946. It existed by virtue of the fact that it was contained in the messages Hitler could have received from other subjects of international law at that time. The legal arguments justifying the particular law against international unjustified aggression of course had to be made, and made persuasively, but for present purposes we are assuming that those arguments could have been made. Our preliminary conclusion here is only that if those arguments could have been made, then there was an international legal rule against unjustified aggression in 1939. That rule was not dependent upon its later enforceability. Its status as law was dependent solely upon the assertion and belief by other actors that the rule was in fact a rule of law that was binding upon Hitler and capable of influencing his course of action. FN7

International Law in the Present World Community

The preceding arguments at best have shown only that a communication that a given rule is a rule of international law is *prima facie* as viable a claim as any other claim that a given rule is a rule of a particular legal system; what remains is the authentication of the given rule and not a dismissal that the claim is erroneous because of considerations having to do with the morality or enforceability of the rule. But even this much may be an important building block toward the construction of international law, since it avoids metaphysical inquiries into the nature of international law or the positivist claims that the content of law depends necessarily upon that which is enforced.

Yet authentication of an alleged rule does depend to some extent upon its congruence with the other two types of messages, those of morality and sanctions, for the simple reason that international law has persisted in roughly its present form through several centuries and hence we are not taking a time-slice of that law at an unrepresentative moment in its history the way we're doing with respect to the imaginary systems considered above. But even with this concession, international law today is undergoing some fundamental changes. Its relation to the normative (moral, *natural law*) realm as well as its relation to the enforcement (sanctions, *positivist*) dimension helps determine its actual content. This is *not* to say that a morally desirable rule is hence a rule of international law, nor to say that what the major powers might enforce (e.g., that only *they* are entitled to have nuclear weapons) is for that reason a rule of international law; such simple correspondences between the desired and the actual are quite alien to my contentions here. Not only are the relationships far more complex, but most importantly we are dealing with an objective realm of law and not with the law as we would like it to be. Any writer of course is tempted to write in his pet contentions to the substance of international law that he purports objectively to describe, and as I have noted elsewhere, the force of one's own contention for what the law ought to be is helped by claiming that such rules of law are objective truths and not mere desiderata.^{FN8} We must try to overcome the temptation to write in our own preferences if we are purporting to describe an [pg87] objective reality. But nevertheless the previously mentioned relationships of law to the normative and enforcement realms remain and we have to deal with them objectively.

An important beginning has been made in the preceding chapter by Nicholas Onuf. Professor Onuf has set out the basic relationship between international law and the assumed objectivity of the positivist model as appropriately modified by H.L.A. Hart and Gidon Gottlieb. Additionally, he has demonstrated the basic tension in present international law between states as traditional subjects of that law and the rising claims of individuals against foreign states or even their own states. Unquestionably international law is being subjected to a kind of strain that is unprecedented in its history, yet the prognosis is not at all a pessimistic one.

The basic reason for guarded optimism is that respect for international law seems to be going up in a world where the use of military force among states seems to be going down. This simple observation constitutes a deep paradox for positivists, which as we shall see may be a good reason why positivistic theory is quite inadequate in its explanatory power. For if positivism views as necessary a correlation between the efficacy of law and its enforcement, then an increasing diminution in enforcement measures might seem to call for a degradation of the

power of law itself. Yet in the nuclear age international law seems to elicit increasing respect. Several explanations are possible. First, the existence of weapons of mass annihilation may have concomitantly reduced the number of wars but increased the stakes if any war were to break out; thus positivists might claim that international law is more enforceable than ever even if it is less enforced. But this claim would seem to be met by the argument that major powers would hardly resort to the use of nuclear warfare to ensure observance of international law, and hence for this particular purpose ICBM stockpiles are paper tigers. Second, perhaps respect for international law is more importantly connected with the internal stability of most national regimes coupled with increasing literacy on the part of the world population. These factors ensure that people are most sensitive to law in general, and hence their receptivity to international law in particular might be increasing. One might respond, however, to this argument by noting that the factors mentioned here have been around a long time, and thus do not seem to constitute a full explanation for the post-World War II situation. Third, one might contend more frontally that international law in fact is not on the ascendant since the International Court of Justice hardly has any cases these days compared to its predecessor the Permanent Court of International Justice. But this observation would apparently equate the number of international disputes (and hence cases) with the existence of law; surely the fewer the disputes the more we can say that a legal system is truly efficacious. Moreover, the many disputes that exist today are not being resolved, except in rare but highly conspicuous instances, by the force of arms. The disputes are being resolved by negotiation and accommodation, with international lawyers playing important roles. Legal arguments are being heard and they are making a difference, even though they are not often heard formally in courts such as the ICJ. Fourth, and lastly, one might account for the increasing role of international law in the world affairs today by claiming that positivists are right after all, except that they have looked for sanctions in the wrong place. Instead of highly visible punitive sanctions, international law today is largely enforced through a spectrum of steps short of acts of warfare. All kinds of harassment might follow upon a nation's violation of an international rule; moreover there will be legal retaliation. (You've broken one rule, we'll break another) or economic retaliation (You've broken a rule, we'll raise tariffs solely against [pg88] your country).FN9 Let us revert for a moment to the parent establishing a rule for a child; the parent need not spank the child, for many other measures of disapproval are possible. The parent might withdraw some expected reward, or the parent might simply express displeasure, which a well-raised child might find to be as much of a sanction as another child might find physical punishment. But as the notion of sanction becomes attenuated, even conceding that thus it becomes more realistic, it begins to depart from the positivist model. If a parent's mere annoyance that a child has broken a rule constitutes a sufficient sanction in the eyes of the child, we may properly ask whether this is a sanction at all or whether it is merely an inherent attribute of law or authority. Most citizens obey most laws—even laws that are morally neutral such as obeying a traffic signal—not because they calculate the odds of being caught and penalized but almost reflexively, as if not to do something which the state has rightly said should not be done. Additionally, the notions of legal retaliation and harassment may not themselves be a full explanation for the sanction theory, since many people believe that two wrongs do not make a right. If nation A allegedly violates international law, we do not automatically expect nation B to demonstrate A's violation by in turn doing something illegal. In other words, we do not wait for B's sanction to determine whether A has violated the law. Rather, we simply expect B to respond that A has violated the law—and it doesn't even matter that B in fact does make such a response.

The expectation of such a response undoubtedly deters many nations in A's position from violating the law in the first instance.

If we can conclude that an objective reality called international law is increasingly important as a factor in helping to modify conduct in the world community—or, what amounts to the same thing, to structure the range of possible alternatives so that only some courses of action appear reasonable and legal—we must next turn to the substance of the relationship between international law and the naturalist and positivist theories that are so important in determining its content. In the preceding chapter Professor Onuf considered these relations largely from a historical viewpoint. Within that general context, let us look at the relationships analytically.

The Opposing Viewpoints of Positivism and Naturalism

I want to argue in this section that positivism and naturalism represent fundamentally opposing epistemologies; and in the next section I will contend that international law today reflects, and necessarily absorbs, the naturalist position.

Although historically it might appear that positivism was a nineteenth century Benthamite-Austinian movement in jurisprudence, in fact a positivist perspective is implicit in the writings of Plato and St. Augustine and even to some extent in the writings of the "father of natural law" St. Thomas Aquinas.^{FN10} Positivism is more than an insistence upon the importance of sanctions as suggested earlier in this chapter; it is more than the "command" theory of law of John Austin or subsequent refinements as outlined by Professor Gnuv in the preceding chapter. Rather, at the essence of positivism is a world outlook that might be described as existential—a denial of imminent [pg89] purposiveness, an emphasis on the present fact of existence no matter how absurd those facts might seem to be. A legal positivist believes that a rule is or is not a rule of law, and if it is a rule of law, then what it commands, however absurdly, gives rise to a legal obligation. Lon L. Fuller once suggested an example that indicates this point clearly: a statute is enacted which contains the word *not* preceding its operative paragraph, rendering the entire statute meaningless or exceptionally misleading and frustrating to anyone purporting to divine its command.^{FN11} A court believing in naturalism might take the position that the word *not* was included by error either when the bill was read before the legislature or later when it was printed in the public code, and thus strike out the word. But a positivist court could not do so, no matter how absurd the consequences, because a positivist court would investigate only whether the statute was validly enacted.^{FN12} If valid, it must be enforced as written; only the legislature can later "remedy the mischief" if mischief there be. Positivism does not require a court or an interpretive body to make sense out of law, but merely to apply it as enacted. Nor does positivism place any requirement upon the legislature; the latter may enact anything into law provided it is in fact the legislature validly engaged in enacting rules. A legislature may enact nonsensical, or impossible, or retroactive laws; it may enact some laws but keep their contents secret from the public; it has total license to command, and a court is required to apply its commands as dictated by the *words* of the statute and not any extrinsic test of meaning. Positivism, in short, is a special kind of theory of meaning; it takes the denotations of words and asks for strict application. It treats legal rules as it would treat electronic commands fed into a computer. The computer must obey the commands exactly, with no attempt to omit a word such as *not* or to change the meaning of any words. (Of course, a

computer may be programmed to correct for certain errors; but it is nevertheless commanded to obey the program without correcting the program for errors. In other words, the computer is not human.)FN13

An entirely different view of the world is suggested in the teleological philosophy of Aristotle, taken up in the bulk of the writings of St. Thomas, and fed decisively into international law by Pufendorf and Grotius. This nonexistential view of law is that the law must make sense as applied to human behavior. A rule of law is something that is enacted by humans in order to fulfill certain human purposes. The purposes, or ends, are really what is important; the law is merely a means to their attainment. Hence a statute that obviously contains a mistake can be corrected by a court. A law that commands people to do the impossible, or that is self-contradictory, or that is deliberately kept secret from those to whom it is purportedly addressed, is not entitled to be interpreted as law by any body, such as a court, that is charged with applying it. A naturalist does not equate courts with computers; he does not strive for realization of the *words* of the law at the expense of its purpose to regulate and order the relationships among people. A naturalist is a peculiarly human interpreter of law; he assumes that the law does not exist [pg90] for itself but rather is a means toward the attainment of human ends. A naturalist must deny the strictly causal theories of some scientists who assert that only material events can precede other highly correlated material events. As Professor Taylor has shown, a teleologist (or for our purposes, a naturalist) necessarily assumes that a future event (an end) influences in the present a line of conduct.FN14 This can only happen for thinking beings who have a vision of an end they want to reach and who use that vision to shape their interpretation of various means that are presented to them. Thus, purposiveness becomes a part of law-interpretation and hence of law-content. The existentialist-positivist, on the other hand, adopts a strictly material causal philosophy, insisting that rules of law be interpreted only according to the present denotative meanings of the words in those rules irrespective of consequences.

Reduced to their essentials, positivism and naturalism thus proceed from two contradictory views of the world: men as machines acting out what could be an absurd drama, and men as teleological beings concerned with future consequences of alternative courses of conduct. While the notion of men as machines may today sound pejorative, in fact for the past three hundred years this picture has been the dominant philosophy in legal circles due to a certain intrinsic attractiveness that it possesses over the naturalist view. One aspect of this attraction is the certainty and efficiency of the positivist view: why allow a court to second guess a legislature when the result may be more "common law confusion" of that type that Bentham excoriated? FN15 Another aspect is the apparent scientific quality of positivism: here, at last, is a pure science which, according to Kelsen and other enthusiasts, could finally be made objective. FN16 Recent years have seen many positivist theorists trying to account for the loose ends in the framework of scientific positivism; though reality seemed elusive, they hoped that by further refining positivist theory all the disconcerting facts of law as actually applied by human beings might be brought within the positivist framework. A final aspect of the attraction of positivist theory is that it promised to divorce any commentator's own views of what the law should be from his description of the law that is. Here, at least, is an important and significant endeavor, but perhaps one need not embrace positivism to ensure its fulfillment. By exercising great care—more than a positivist writer need exercise—a naturalist-oriented writer can still divorce his own predilections from his description of the law that exists, even though his description of the

objective existing law necessarily includes purposive-oriented standards of the law that ought to be.

Historically, positivism certainly corrected the common law excesses of naturalism as ridiculed by Bentham.FN17 In this sense it was and has been a healthy corrective. But I want to argue next that present-day international law reflects the naturalist and not the positivist perspective, and that this reflection has great substantive significance.

Natural Law and International Law

The notion of teleology in naturalism is more than an empty formality to the effect that perceived future purposes can guide present actions. The historical development of [pg91] natural law contributes the essential substantive fact that human purpose is everywhere pretty much the same, that people strive for (roughly) the same basic values, and that the meanings we can attribute to norms of international law make sense in the same sort of way to widely divergent peoples in developed and developing nations alike. Were it not for the essential sameness of human nature, so insisted upon by St. Thomas and assumed in the writings of Myres McDougal and his associates,FN18 natural law would be deflated into existentialism, with a person becoming a purposeless being in a world that may be absurd. Natural law is a non-arbitrary set of human standards that retains its meaning for all people at all times in all places. Its claim is, for this reason, arrogant; but the opposite claim sells humanity short.

The increasing assertion of human rights against the depredations of governments is an example of substantive natural law in the international legal arena.FN19 Natural law combines two great substantive principles: the goal of survival of the human species, and justice to individuals. Any artificial entity, such as a state, that stands in the way of the attainment of these principles is contrary to natural law (as the greatest philosopher of the state as an entity—Hegel—fully realized in his strictures against natural law). The relation of the state to the naturalist needs of the world community will be more fully considered in the next part of this chapter.

It is instructive to note that anyone's list of basic human rights is invariably universal in its claim. Equality under the law or freedom of speech or the rights of women, for example, are not claimed for a particular region or a collection of states in a certain economic classification; rather, these and other human rights are asserted to apply to all people wherever situated. The push toward universality in such claims is a natural concomitant of the naturalist perspective. If law itself does not mean arbitrarily different things in different places, under naturalist theory, then certainly rights and freedoms should also be grounded in universality.

St. Thomas talked about "right reason" as the meaning to be given to natural law.FN20 His scope was global; by "right" he did not mean "right only in the context of Western Europe during the Middle Ages." And "reason" was not the exclusive province of Churchmen (no wonder that true natural law was a subversive doctrine insofar as the Catholic Church was concerned, the Church after St. Thomas emphasizing the primacy of "Divine Law" and canon law over the dictates of right reason). The tendency toward universality is probably inherent in any contemplation of the right as distinct from the expedient course of action for any person to

take. If something is right, it is right in all similar contexts whatever the time or place. Surely killing another person for private gain is wrong throughout the world; regardless of the wide variances in cultures, we can still recognize murder when we see it, and we can distinguish it even from tribal sacrificial rites or state executions of criminals or self-defense. But what about abortion? Is that murder? Didn't St. Thomas so hold? Doesn't the abortion example prove the non-universality of so-called natural law? What if the right to abortion were to appear on a United Nations list of basic human rights?

We must relate abortion, as any other substantive claim, to the two fundamental natural law principles: perpetuation of the species and justice to the individual. In St. [pg92] Thomas' time, there was a perceived threat of underpopulation to the future of the human race. Indeed, seventy-five years after his death, the plague decimated Europe. In that context, abortion was a crime against the future survival of the human race. Today, perceptions are quite the opposite: the threat to human survival is more a matter of overpopulation than underpopulation. Far from being a threat to human survival, abortion today may be an aid to the future of human life on this planet. But we can well imagine a future where nuclear devastation has left few survivors, and in such a context abortion again might be linked to future survivability and hence be prohibited by "right reason."

But medieval strictures against abortion have had an important psychological effect, which today is manifested in the feeling of the sacredness of human life. This feeling too is very important to the survival of the species. Much of this feeling is manifested by the anti-abortionists, and even those who disagree with their position must concede that the anti-abortionists are not acting out of selfish or hedonistic motives but rather are articulating a basic feeling of the sacredness of life that might tend to be downgraded in an overpopulated world. (Studies of animal overpopulation invariably show behavior that becomes predicated on the pervasive assumption that life is cheap and reproduction is unnecessary.) Thus a U.N. right-to-abortion plank might be counter-productive in downgrading the sacredness of life at the same time that it would be productive in asserting the rights of women and helping to reduce global overpopulation. We can only conclude that the abortion issue is necessarily complex, but certainly does not destroy the universality of the claim that what is paramount is the survival of the species.

Focusing upon species survival also brings out the relevance of environmental protection in the international law context. Persons or governments have no right ,to destroy the life sustaining environment or permanently deplete it of, for example, an animal or plant species; such actions endanger the future survivability of the human race. Often in the short-term, even if measured by the life span of an individual, environment-depleting actions can be economically profitable (even to the point that it would not pay others to deter such actions.) Only natural law—and the effect it is having upon substantive international law—may stand as a realistic deterrent to such actions.FN21

Professor Falk has well described the fundamental disparities among peoples today and the challenges faced by the world community.FN22 There is an extremely unequal distribution of wealth. Nuclear armaments are stockpiled that can destroy all life forms forever. The world is overpopulated and many are starving to death. Our natural environment is being poisoned and

resources necessary to organic life are wantonly exploited. And superimposed upon all these problems is the nation-state system, where governments pursue narrowly defined bureaucratic values often at the expense of the people. Such governments can no longer be changed by the threat of war, for nuclear war against any major government will equally destroy victor and vanquished. All that is left is law and, perhaps, right reason. But international law as we know it is largely state dominated. Its subject-creators traditionally have been nations, not persons. And while we are seeing a transition from states as exclusive subjects of international law to people increasingly obtaining international legal rights, described by Professor Onuf in the preceding chapter, we still are faced with the problem that traditional international law might be unable to meet world needs because it assumes subject entities that are nations and not persons.

[pg93] *Nations as Subject-Creators of International Law: The Basic Context*

International law suggests a system of laws between and among nations; in this classic view, states are the creator-subjects of that legal system. But there are other logical possibilities. Mankind might have refused to recognize all artificial entities; international law could have meant, simply, the law governing transactions among individuals across national frontiers (the nations, in this case, not constituting separate legal entities but merely names for aggregations of individuals in geographic areas). Present international law seems to be on the road to recognizing individual actions as part of international adjudication in limited areas such as the European Court of Human Rights. Another possibility would be to recognize artificial international entities other than states-multinational corporations and intergovernmental organizations, for example. A more revolutionary approach would be the extreme form of functionalism described by David Mitrany^{FN23} where all governmental functions are performed by international agencies and bureaucracies, that presumably then would be the sole subjects of international law. The above possibilities are generally conceived at the substate level, but other possible forms of international legal interaction could occur supranationally: regionalism (a region might include states *and* parts of states) and world organizations, both of which could impose law downward upon states and people. As Professor Onuf has remarked in the first chapter, the present system is dominated by the relations of states even though writers disagree about how significant an inroad has been made by other forms.

How do these various forms relate to the overwhelming problems confronting mankind today: environmental degradation and the threat of total nuclear war? How do they relate to other problems that may not involve destruction of the human species but just as seriously affect the meaning of life: human freedoms and rights, relief from overpopulation, freedom from hunger and severe poverty? A natural law perspective would hold that a rational relation between the forms of the legal system and the basic needs of mankind is more than a desideratum; it is a necessity. Yet two enormous tasks impend: First, we must attempt to solve the theoretical problem of determining what forms, in detail, are most rationally related to the solution of these problems; second, people and their governments must be persuaded to operationalize these forms. No matter how hopeless or utopian this second task of persuasion might seem, we cannot even undertake it without first solving the theoretical problem.

The remaining chapters in this book are addressed to aspects of the various forms, present and emerging, that constitute the international legal system. My task in the rest of this chapter

involves a partial examination of the first and most traditional form of international law, that involving states as subject-creators. I will be concerned primarily with mechanisms of law-creation among states, but some preliminary consideration might usefully be given here to the concept of state in political philosophy and its potential relevance to the basic challenges to human survival on this small planet.

Four possible notions of a state are as follows:

(1) A state is nothing at all; it is a mere word giving a name to all the people within a defined geographic area.

(2) A state is an entity independent of the people within it; it is a force in itself; it is a right in Hegel's sense.

[pg94] (3) A state represents more than people in a geographic area, because it represents the human species—dead people (tradition in Burke's sense), living people, and potential people.

(4) A state represents not only past, present, and future persons, but also a symbiotic tie between these people and the land they live on (exemplified in the writings of, among others, Mazzini). Under this view, people living in one state would become different people if they migrated to a different state.

The first possibility might be labelled as liberal in today's terms, the second reactionary. Perhaps without states we would not be in a position today to fear thermonuclear destruction. On the other hand, if nuclear weapons were invented in a nationless world, certain individuals might obtain a monopoly and terrorize everyone else. In short, we must not confuse theories of how mankind got into its present predicament with rational solutions for getting out of it. Now that nuclear weapons *are* stockpiled that can destroy all life and continue to "make the rubble bounce," are they best controlled by a state system or by some other kind of system? Perhaps a state in the third sense given above might have a collective rationality greater than that of individuals. An individual, after all, could believe in taking the world down with him—*après moi, le déluge*. But a number of governmental officials, some of whom have families, might not think the same way. Perhaps there is conservatism in collectivity. Similarly, with respect to environmental degradation, it is not at all clear that governments will act less responsibly than other entities, including persons or multinational corporations or regional associations. There is cause for great despair at the lack of progress among governments in stemming the destruction of species such as whales, in reversing global air pollution or destruction of the stratospheric ozone layer, or in checking the population explosion; yet would other forms of legal organization behave any better; and if there are any, how are they better? These questions are not rhetorical; obviously much thought has to be addressed to them in the years ahead.

My limited task here is to show that some degree of rationality, at least, results from the fact that international law is not created out of the whims of individual states (their policies, their unilateral declarations, their claims) but rather is created out of interstate relations. Since states try to survive, and since their survival is predicated on some minimal degree of order, their interactions—forming universal customary law—will normally be rational in the natural law sense of being purposive.

My discussion will be in terms of a referent—that of a logical validator of what assertions "count" as rules of the system. This attempt to search for a mechanism is prompted by a natural law perspective, for the mechanism presumes that states do not act arbitrarily and that their

interactions reflect a consensus about mutually desirable rules. To say this much is not to assert that the present international system is capable of solving the problems of environmental degradation and thermonuclear destruction but rather simply to examine what the capabilities might be in a formal sense. Let us, therefore, turn to an examination of the mechanism for generating interstate rules.

THE RELATION OF RULES TO STATES

International law is more than a communication that affects state behavior. It also defines international reality. The law tells states when they are injured; states feel no pain and hence have to be told when they are hurt. The law also tells states what appropriate responses may be made to such injuries. Law defines the scope of a nation's legitimate interests—its entitlements. A nation may want many things that it is not entitled to have—e.g., to import inexpensive oil, to have exclusive fishing rights to the Atlantic Ocean, to add to its territory at the expense of neighboring nations. But only its [pg95] entitlements as defined by international law constitute claims which, if not recognized by other states, tend reciprocally to adversely affect the entitlements of those other states. Finally, international law erects a structural perspective for interpreting international claim conflicts.

The competing interests of states inevitably clash in the international arena. International law in the first instance serves as a sort of signal to tell states which of these clashes are acceptable and which are deserving of retaliation. A mental experiment may help illustrate this function of law. State A is wealthier and militarily more powerful than its neighbor state B. If both states need to import oil but state A consistently outbids state B for the oil so that most of the short supply goes to A and not B, state B normally would have no justifiable complaint against A and would not attempt any retaliatory measures outside of possible economic retaliation. If state B were to commit a hostile act against A—e.g., imprisoning 100 of state A's nationals resident in B until state A lowers its bid price for the oil—we can well imagine that A's reaction would not be to lower its bid price but rather, perhaps, to imprison 120 of state B's nationals resident in A. In short, B has reacted inappropriately to A's economic aggression by an illegal act; A's economic aggression was not illegal but B's act of imprisonment was illegal and was perceived to be illegal by A which retaliated in kind. If B were then to retaliate again by an even greater illegality, B could only expect another round of retaliation in kind. This no-win strategy is probably why we would not ordinarily expect B to engage in an illegal retaliation for A's legal initial action.

Now let us change the situation by supposing that A, having cornered the supply of oil, decides to drop some bombs on B's few domestic oilfields. The bombing is clearly an illegal act that would engender retaliation by B. Even though A is militarily the more powerful state, it would probably refrain from committing such an overt unprovoked act against B. The sheer illegality of the act would undoubtedly transform B into a tougher opponent than B was on paper, for B would feel justified in fighting back, her citizens aroused, whereas A's citizens might be reluctant to fight very hard in such an unjustified cause. Of course, actual wars are never so simple, and nations can fight for what seem in retrospect to be unjustified causes. But I am trying to show why a great many potential wars never get fought. They do not arise because most nations do not initiate illegal aggressions upon weaker neighbors.

A final point needs to be made about this thought experiment. A's initial cornering of the oil supply might have had extremely deleterious consequences for B; perhaps many more citizens of B starved to death due to the lack of oil to power farm machinery than the 120 citizens that might be hurt if B started a chain of retaliation. Yet the amount of real suffering visited upon a nation is no test of legality. In the present world at the present time, international law tells us that it is legal for one nation to outbid another in the international oil market, but it is illegal for one nation to imprison the nationals of another nation without legal cause. State B may feel much more pain from a legal economic attack than from an illegal physical attack, yet the law tells B that the legal pain is not a pain at all but the illegal physical injury, however slight, is justification for retaliation or resort to third-party intervention.

What underlies this strange set of legal injuries that states experience? We should examine the fundamental structural assumptions of the international legal system. Perhaps one of the best ways to get a perspective of that system is to take some of the central assumptions of international law and imagine what the world would be like without them. If successful, this exercise in imagination will do more than give us an analytical perspective. It will help narrow the class of purported international norms that [pg96] cannot become rules of law because they do not share the basic characteristics of international law as we have come to know it.

One of the most basic and deep-rooted postulates of international law is that of the sovereign equality of nations. Suppose, instead, that international law had evolved differently. Suppose the law reflected accurately the differences in the armed might of the various nations. The law would give more rights and privileges to the stronger nation, and fewer to the weaker nation. The United States and the Soviet Union might have, say, an exclusive fisheries coastal zone of 200 miles, Canada 100 miles, Chile and Mexico 50 miles each, and Costa Rica 25 miles. Of course this result seems strange, but its strangeness is because we are all conditioned to accept the notion of legal equality. In particular, the most powerful states naturally assume in negotiations such as the Law of the Sea Conferences that whatever the breadth of contiguous zones may be adopted, the breadth will be the same for all coastal states. In this, among many ways, the notion of equality of states under international law is a powerful force operating to the advantage of weaker states. When newly emerging and third-world states claim that international law was invented by European powers for their own interests and that norms of international law can be freely accepted or rejected by the new 'nations, they are essentially taking a doctrinal position for bargaining purposes that they might reject if they stood the chance of losing all the benefits of international law.

Another basic characteristic of international law is that any rule in the system must prohibit at least certain kinds of actions. A rule of law means that the actor must refrain from doing something that he otherwise might have been inclined to do. Sometimes writers cast their nets so broadly as to include within international law everything that states do; the result is to find law everywhere, but at the great loss of making it impossible for any state to violate the law. This supererogatory result is sometimes found in the writings of Professor McDougal and his associates when the claim appears to be made that if certain states share the proper values and act with the proper motives, everything they do is legal.^{FN24} On the opposite extreme, some writers claim that the laws of warfare are not true laws of international law because they seem to have

little if any power in fact to prohibit the actor from doing what he wants to do in a wartime situation.FN25 But this view is probably erroneous both from a factual and a theoretical perspective. Factually, the laws of war like any other laws indicate what initiatives are legal and hence subject to legal retaliation, and what initiatives are illegal and hence open up extreme, impassioned, and sometimes unrestrained retaliation. Even in the bitterest wars there are hundreds if not thousands of understood reciprocal restraints in small and large matters affecting both sides. These restraints are keyed around perceived legalities and illegalities of the conduct of warfare. Of course, the restraints sometimes break down, but even in domestic law not all laws are always enforced by prosecutors, and certainly all laws are not always obeyed (the rising crime rate does not mean that criminal laws are losing their status as legal prohibitions).FN26 And from a theoretical standpoint, positivists in the Austinian tradition, particularly Kelsen, have insisted upon finding [pg97] some sanction behind all laws. These writers find it particularly difficult to deal with the laws of war because in a war there is a breakdown of an authoritative sanction-source to enforce laws. FN27 What these writers seemed to have failed to appreciate is the consequence of viewing law as a set of words. The words of law that specify primary delicts are not unlike the words of law that command those who would enforce the law. A prosecutor in domestic law can violate the law that commands him to prosecute murderers just as the murderer can violate the primary law against homicide. But if the prosecutor decides not to prosecute—even if he announces that he will no longer prosecute any criminal matters—we do not say that there are no longer any primary laws against crime. A crime is still a crime; someday some official might attach a penalty to it. Similarly, in wartime, the failure, no matter how widespread, to enforce certain laws of warfare does not mean that these laws have vanished. Their violation is always potentially capable of being penalized—after the war, or as retaliation during the war. What is significant is that the law has characterized the event, and in thus characterizing it, has said that a future sanction could legally be applied to it. This is all that law, as a set of words, can ever do. What actually happens as a consequence of the violation of legal norms is by and large a matter of post-legal behavior.FN28

An important consequence of the view that international law minimally prohibits certain classes of actions is that we should view critically any claim that unilateral declarations of law are per se evidence of what the law is.FN29 A nation may claim anything; it may make a claim for something that is patently illegal just to see whether other nations will let it get away with the claim. Similarly, an attorney general's opinion is not evidence of the content of international law, nor is a nation's pleadings in an international dispute (obviously there are two sides to a dispute and both cannot be right). The tendency of some writers to amass claims of all sorts—often those made in an international forum such as the United Nations—and use these as evidence of international law can paint a misleading picture of the content of international law. Indeed, it is probably not too great an exaggeration to say that most statements by nations (including their diplomatic speeches and writings, foreign office correspondence, attorney general opinions, writings of their own establishment of international legal scholars, and public mass-media speeches) are carefully contrived for the purpose of eliciting advantage in the vast process of international negotiation, and are not—even though many purport to be—restatements of international law. If anything an interested party says is evidence of law, then international law in total would hardly prohibit any actions at all. There would be no point in calling it law.

Finally, let us consider a third basic postulate of international law: the unidimensionality of rules. It is characteristic of rules that, where they apply, they apply completely and fully to that and to similar factual situations. Rules do not arbitrarily apply sometimes to the same factual situations; nor do they require a mere attempt at compliance or give the affected state discretion whether or not to obey them. Conceivably we could have had [pg98] other dimensions to rules, giving them the character of weights which may or may not be taken into account. To some extent, the notion of "principles of law" as formulated by Ronald Dworkin^{FN30} and as reflected in Article 38 of the Statute of the International Court of Justice^{FN31} applies as a weight to be added into the balance in international decision-making. But rules or norms of law must be sharply distinguished from principles. As to rules or norms, the only important question is whether or not they are rules of the system of international law. Of course, we may have so called emerging rules of the system whose status is uncertain. But as to the latter, the debate is whether the rule has or has not arrived; significantly, the debate never is addressed to a compromise position that would accord to the rule a half-status between law and non-law. We would not know what to do with a rule in this grey area. Nations want to know whether or not they are currently bound by an alleged rule of international law. The line between law and non-law is crucially significant in international law. Our task, then, is to try to specify how the line is to be drawn. Of all the alleged rules and norms that on their face could be rules of international law, how do we select the smaller set of rules that actually are rules of that system?

An Objective Validator of International Law

Prior to the nineteenth century it hardly occurred to anyone to desire an objective test for determining what was the law and what was not the law. The law—whether municipal or international—was rooted in immemorial custom, in natural law, in eternal principles, and in reason. If there was a dispute, a judge would decide the question, his decision contributing to the clarity of the law in its restatement of what everyone should have known anyway. But legislative reform gave the impetus to a rethinking of validating procedures for the law. Bentham's desire to change the content of the common law through legislation led him naturally to question the authenticity of the common law.^{FN32} Austin, who did not share Bentham's antipathy to the common law, nevertheless theorized that the common law owed its efficacy only to its being adopted by the sovereign.^{FN33} Breaking from the centuries-old tradition that the law was binding on everyone, Austin, doing for law what Bodin and Hobbes had done for political philosophy, posited a sovereign who was above the law and under whom law existed through his sufferance. The sovereign became the objective validator of all law; what he commanded, or allowed, was law; nothing was law that was contrary to his commands. Finding his view of law inapplicable to the international arena because of the difficulty of locating a sovereign there, Austin redefined international law as not being law but mere "positive morality." ^{FN34}

But the simple mechanism of a sovereign being the objective validator of law even in domestic systems increasingly was shown to be deficient. First, laws that defined and accounted for the succession of sovereigns could not themselves be sovereign commands. [pg99] Second, in some systems it became very hard to locate the sovereign at all. Attempting to cope with this latter difficulty, Hart has posited the idea of the sovereignty of a "rule of recognition."^{FN35} But I think that Hart's solution will eventually fail for the same reasons as Austin's. In the first place, Hart cannot account for changes in the rule of recognition or in its replacement by a successor

rule. Secondly, in some systems the rule is fairly clear (as in states with a written constitution) but in some it seems so diffuse and so rooted in common law and custom that the rule is too broad to be helpful in its avowed purpose as serving as an objective validator.FN36

If Hart's conceptualization eventually fails for the latter reason, he nevertheless has forcefully reminded us of the necessity for finding secondary rules in a legal system that account for the creation and change of the primary rules. This is no less important internationally than domestically. The set of international secondary rules that one might—if one feels the need—call the international rule of recognition has usually been discussed under the misleading term *sources of law*. The sources of international law do not form a closed set; there is nothing to prevent the community of nations from someday recognizing a new authoritative source. The open-endedness of the possible sources or validators of international law does not make it any the less law than Godel's proof of the open-endedness of any mathematical system of an order of complexity that would include the real numbers has made mathematics any the less mathematical.

Consensus. One alleged validator of international rules is the consensus of states. We have come to know the term *consensus* as denoting that situation where a rule or policy is proposed and no one actively opposes it. Some may abstain from voting or may not be willing to endorse the group decision, but a consensus may still obtain. But consensus is not the same as a majority vote. There is no international mechanism for creating rules by majority of states through some sort of legislative process. For example, a resolution directed against South Africa in the General Assembly of the United Nations, and actively opposed by South Africa, is not in itself a rule of law by virtue of the consensus of states.FN37 Of course, the resolution might reflect already existing law, but then it would be the existing law and not the resolution that counts. As much as nations might want to transform General Assembly resolutions into law, we must acknowledge at this state of world law that one actively opposed dissenter is enough to destroy the consensus. The General Assembly may, in Professor Falk's term, have *quasi-legislative* competence, but this is not the same as legislative competence.FN38

Nearly all rules of international law at present enjoy the status of law by virtue of the consensus of states over time. We tend to regard the settled rules of international law as those rules that are not actively opposed by a state or group of states. Sometimes the consensus has not been derived by reference to the specific rule itself but to the other kinds of validators (such as custom) which themselves are a product of the consensus of states. But consensus is not a very useful mechanism for introducing new laws directly because adversely affected states can actively oppose such rules.FN39 Proposed rules that [pg100] adversely affect the important interests of states will not be adopted by the international community through any sort of consensus mechanism. On the other hand, clarificatory rules and those which progressively develop the content of international law are becoming incorporated into the body of international norms through the slow and patient work of groups such as the International Law Commission. By soliciting comments from states, these international groups engaged in progressive development of the law often achieve consensus on a large number of proposed restatements of the law by virtue of the states not objecting to the reformulations.

Clearly the most important function of consensus is in its validation of the other validators. The secondary rules relating to custom, treaty, decisions of courts, and so forth, are the product of the consensus of nations and hence are the most significant means for changing old norms and creating new ones.

Custom. The workability of custom as a validator of international rules stems primarily from a nation's actions being far more conservative than its claims, desires, threats, responses, and wishes. A nation might desire exclusive fishing rights to the Atlantic Ocean; it might make a claim to a large area of that ocean; it might even issue a legal opinion that it owns the fish in the ocean. But these wishes are not translated into reality; the nation does not attempt to bar all other fishing vessels from the Atlantic Ocean. Hence it was early perceived that a nation's actions in the international arena are a far better guide to the underlying rules of law than its claims or its desires. When we sum all nations' actions, we have a fairly good view of the implicit principles that channel such actions in certain directions and not in others. Custom is grounded on this material component of action (or abstention from action).

But not everything a nation does or does not do constitutes custom in the international sense. When a nation taxes its own resident nationals it is not creating an international rule of taxation; although Kelsen theorized that international law *permits* such taxation, his argument was only a theoretical construct to the effect that everything not prohibited by international law is permitted by it.^{FN40} When a nation extends a mere courtesy to another nation (e.g., by displaying the other nation's flag on one of its city streets), such an action does not form part of custom so that a rule is developed *requiring* the nation to display the flag forever.^{FN41} Thus, to formulate a rule of *customary* law, we must have both an act (the material component) and a characterization of that act (the [pg101] qualitative or psychological component) as a norm of international law. I have attempted to spell out these factors elsewhere and would not want to repeat them here.^{FN42} However, I would note a dissent to Professor Onuf's view in the preceding chapter^{FN43} that the only characterization or articulation of an act that international customary rules require is to indicate which acts are not law so that all the rest of them can generate rules of law. To my mind this would present an unnecessary burden on states to continually characterize harmless acts as non-law (e.g., if a statesman signs a treaty with a fountain pen, he would need to announce that he is doing so only as a matter of courtesy and not with a view to generating a future law that will require the use of fountain pens if treaties are to be validly signed). Of course, maybe states someday will welcome such a burden, but until they do, all that Custom as a validator of rules of law seems to require is a positive articulation and not Professor Onuf's less restrictive negative disclaimer.

The articulation of an act as formative of a customary rule need not come from the acting state; what is minimally required is that states be put on notice of the articulation. Sometimes scholars can play a crucial role in the formation of customary law by writings which amount to an articulation of a rule. A possible example is Professor Falk's characterization of the three types of violent conflict in civil strife.^{FN44} In an area as complex as irregular warfare, such an organizing principle might suddenly clarify what had previously appeared to be divergent practices and suggest an implicit rule of customary law that the actions

of states involved in civil strife were in fact substantiating. Inasmuch as Professor Falk's views were published during the Vietnam War, his articulation was contemporaneous with the acts themselves. It is too early to tell whether, in this particular case, new customary rules of universal validity were set in motion that will affect the way nations will react in the future to civil strife.

Treaties. Treaties and other international agreements tend to supply the bulk of articulations of rules.FN45 Moreover, entering into a treaty is an act of a state, a legal commitment to act or refrain from acting in a treaty-specified way. As a result, treaty rules tend to become rules of customary international law (unless opposed by contrary rules in other treaties).FN46 A treaty that creates a particular law for the parties is thus also an instrument for the universalization of rules, not by virtue of what the parties intend (because all they presumably intend to do is to make an agreement between themselves) but by virtue of international perceptions about the rule-generating ability of treaty provisions.FN47

[pg102] **Judicial Decisions.** Despite an uneven performance through the years and a noticeably uncrowded docket, the International Court of Justice is perhaps the closest thing we have to a tangible objective validator of rules. Its opinions are greatly respected and frequently cited by states. Its judges today are more representative of the community of all nations than in the past, but whether its caseload will expand is problematical.

Other international Courts of all kinds are feeder streams into the river of international law. Can we include domestic courts as well, when they deal with international questions? Professor Falk argues that we should, but in chapter 1 Professor Onuf indicates that such courts are on a par with a unilateral opinion of a nation. Perhaps the truth lies somewhere in between. Professor Onuf is right insofar as he is pointing out that a domestic court does not contribute to the development of international law merely by saying that it is applying international law. But any court does more than issue an opinion; it issues a decision. The decision itself can affect international interests, and if erroneous can lead to retaliation by the foreign state. The decision, moreover, embodies a concession for reciprocal treatment when a similar case comes up in a foreign nation's domestic court system. In these respects, decisions of domestic courts involving international questions directly contribute to the form of international rules by the process of custom. The decisions are acts of states containing, in the accompanying opinions, their own articulation.

Hence, we might conclude that the International Court of Justice, by virtue of its acknowledgement by states, is itself a validator of international norms, whereas domestic courts (which of course have no such international acknowledgement) may make their greatest contribution by the operation of a previously discussed objective validator, namely, custom.

General Principles of Law. To Professor Onuf's analysis in chapter 1 on "general principles of law recognized by civilized nations" (as found in Article 38 of the Statute of the International Court of Justice), I would like to add an observation based upon Professor Dworkin's work that has not yet been applied to international studies. Professor Dworkin has shown that there is something fundamentally different between a principle and a rule. FN48 A

principle is entitled to a certain weight in the consideration of a decision, whereas a rule points to an unambiguous result. A rule either applies or it doesn't apply; if it applies, it is decisive. But a principle may apply and yet be overshadowed by other [pg103] principles. The principle "no man should profit by his own wrong" is one that is found in most domestic legal systems, yet it can be overshadowed in domestic law by, for example, the principle of quieting title to real estate in a case involving adverse possession (where the adverse possessor clearly profits from his own wrong). The principle that tends to invalidate contracts achieved by coercion does not apply to treaties of peace between two states that were previously at war; here another principle, namely the avoidance of further violence, validates unequal peace treaties. In the law of war, competing principles are military necessity and humanitarianism, and, as Quincy Wright pointed out,^{FN49} the principle of ending the war quickly and the principle of securing a just and lasting peace (the latter could be compromised if brutally illegal means are adopted to end the war more quickly). These principles do not decide specific cases but they are factors in the decisions. The numerous post-World War II military trials in Europe and Asia were often decided on the basis of these principles, particularly in the sentences that were meted out, when the defendants pleaded exceptions to the rules of the conduct of war that were applied to them.

General principles of law can thus be very important as weights or factors in international legal decision-making. Their operation in this respect is very much like that described by Professor McDougal and his associates, who however were talking about the rules and norms of international law as well as principles (and thus perhaps cast too wide a net).^{FN50} By virtue of the inclusion of general principles in Article 38, and also through their basic familiarity to lawyers as described by Professor Onuf, "general principles of law recognized by civilized nations" has become *prima facie* an objective validator of international principles. When a given principle arises in a case or dispute, its proponent should examine the domestic law of all the nations (if he has the time and resources to do so!) and if he can show that most or all nations recognize the principle in their domestic legal systems, he will have made out a *prima facie* case for the inclusion of that principle in the international legal dispute. However, mere similarity in provisions in the laws of many nations does not itself mean that a similar rule is a rule of international law. To lift the rule from national to international status still requires some showing of customary law—that the rule has been applied in at least one interaction between states.

Unilateral Declarations and International Law Formation. We have seen that a unilateral claim or declaration by a state cannot per se be evidence of customary law inasmuch as the claim may be patently illegal or it may be a trial balloon with the claimant state not intending to follow through upon the claim unless the reaction of other states is favorable. Yet in the past few years we have witnessed a proliferation of unilateral claims on the part of coastal states to various kinds of exclusive jurisdiction or control over contiguous zones of the high seas and submarine areas. Perhaps these claims have been partially inspired by the success of the Truman Proclamation of September 28, 1945^{FN51} regarding the continental shelf of the United States. This famous proclamation deserves a closer look with respect to the question of its impact upon general norms of international law.

President Truman proclaimed that the policy of the United States was to regard the

continental shelf "as appertaining to the United States, subject to its jurisdiction and control."FN52 A month later Mexico followed with a similar Presidential Proclamation, and [pg104] before the decade was over another twelve nations had issued similar unilateral decrees. FN53 When, if at any time, was any law created by these decrees?

The Truman Proclamation did not descend upon an unsuspecting world. The United States Department of State had shown a draft of the proclamation to representatives of Canada, Cuba, Denmark, France, Great Britain, Iceland, Mexico, The Netherlands, Norway, Portugal, and the Soviet Union, and none of the governments consulted expressed opposition, to the American proposal to issue the proclamation.FN54 At least with respect to all the governments consulted, we may say that a consensus had been reached prior to the date of Truman's proclamation. In addition to this consensus, we must not overlook the fact that prior to 1945 there was scant attention to the continental shelf, and certainly there was no rule of international law in opposition to coastal state control over its continental shelf. Had there been such a law saying, for example, that the continental shelf belonged to all nations equally, then the Truman Proclamation would have had a harder burden of justification. Moreover, we might even assume that if such a law existed, the nations consulted on the draft proclamation, or some of them, probably would have objected. Therefore, we might conclude tentatively that the Truman Proclamation articulated a rule that the world community was prepared to accept in an area where there was no contrary rule or practice.

Now let us look at the situation a month or two after the issuance of the Truman Proclamation. Other states now had a clear opportunity to protest. In the absence of protest, we have additional evidence of a universal consensus. The evidence is not conclusive, as I have argued elsewhere, because states may reasonably not want to protest even though they disagree with the claim.FN55

Further evidence of consensus occurs when state after state issues decrees similar to the Truman Proclamation. As time has passed and more states have become aware of riches in the continental shelf, more states have issued such decrees. In more recent years when some states have realized that the coastal states' claims deprive others of access to minerals, the have-not states have complained, but then the objections may have come too late. A consensus may already have been formed.

But apart from the operations of consensus, customary law was forming when states began to act upon their claims. Truman's proclamation itself did not create customary law; it supplied an articulation of a rule, but not any underlying practice. Nor was there a commitment to act (as would have obtained had there been a treaty relating to the continental shelf). But with the course of time, mining and fishing (sedentary) operations on the continental shelves of various countries that were confined exclusively to nationals or (even stronger evidence) licensed to non-nationals created customary law binding upon all nations. It is by virtue of this practice, rather than the more frail need of consensus, that the rule of coastal state jurisdiction is so strong today.

The continental shelf story contains lessons for claims today for exclusive jurisdiction over wide contiguous zones. Suppose a nation claims that it owns 500 miles of the ocean

perpendicular to its coastline. The claim may be expressed in a presidential proclamation, in an amendment to the state's own constitution, or in any similar fashion. Such a claim, unlike Truman's, intrudes upon an area already subject to a clear rule of international law—the freedom of the seas. Now, what are we to make of such a claim?

In the first place, if the nation making the claim has previously shown a draft to a [pg105] large number of states and has received no objections, then the claim might be expressive of a new consensus. (There is nothing logically wrong with a new consensus of all states that wipes out the previous rule of freedom of the seas—states in the aggregate are free to change any rule of international law because they are the creator-subjects of international rules.) If the nation making the claim does not show a draft to other states, we might assume that it chooses not to show the draft because it knows that the other states would object. This assumption, of course, stems from the fact that a contrary rule already obtains in the area of the proposed declaration.

What is the status of the international law of freedom of the seas a month after a state makes a unilateral claim to 500 miles of contiguous zones? Has the claim changed the established rule? Has it even planted a seed of change? Here, I think we have to be careful and analytically precise.

If the claim represents a new consensus, then of course it may be indicative of a change in the underlying rule. But, in all likelihood, the 500-mile claim does not indicate a change of attitude on the part of other states. If it does, then in due course we will see the fruition of that change of attitude as other states make 500-mile claims and respect the claims of states that have already made similar declarations; in that case, the process of consensus would be at work. But let us now look at the single 500-mile claim in isolation. Suppose no other state has (yet) made a similar claim. Does the single 500-mile claim itself change, even slightly, the underlying freedom-of-the-seas rule?

Clearly no change has taken place at this point through the process of consensus, since a single state by definition does not create a consensus. In the absence of other states issuing or respecting similar claims, there is no consensus. A single state's unilateral declaration therefore has absolutely no effect upon the underlying international rule through the operation of consensus. For the consensus operation to work, we need many more than one state. What we need is the participation of other states in the 500-mile rule plus the contemporary absence of protest (or other forms of disagreement) from the rest of the states. Practically speaking, this is unlikely, although, as I have noted, it is not logically impossible.

What then of the operation of custom as a universal validator of the 500-mile claim? FN56 Let us look at the single state's unilateral claim. Does the claim constitute a customary practice? Here the answer must be no. At best the claim articulates a rule which could be realized by acts of the claimant state that affect other states. But an articulation of a rule cannot itself be custom, for the basic reason that the claimant state has done nothing internationally except state a claim. The claim itself runs contrary to the rule of freedom of the seas. The state issuing the claim may not even intend to back it up; it may simply be issuing a trial balloon. Moreover, other states would have no reason to protest this claim. They may believe that the issuing state does

not intend to follow through on actualizing the claim, or they may believe that there will be enough time to dispute it when the claimant state actually tries to do something in support of its claim (e.g., seize another state's fishing boat 450 miles offshore). Finally, other states may continue to act on the understanding that fisheries 450 miles off any state's coastline are open to all states, and thus state practice is built up daily with respect to the rule of freedom of the seas. This practice, all the other states may believe, is enough to overwhelm any attempt at a contrary practice by the single state making a 500-mile claim.

[pg106] If the state's 500-mile claim has no impact, standing alone, either upon consensus or custom as validators of the claim, is it a totally futile gesture from a legal standpoint? Of course, it may start the ball rolling so that, if other states emulate and repeat the claim, eventually consensus or custom may create a 500-mile exclusive jurisdiction rule in what was formerly the high seas. But this is saying very little, for the legal impact of the claimant's proclamation depends upon the actions of others. Is there no legal significance to the claimant's proclamation standing alone? The only significance that I can find is that it is an invitation, an offer, for reciprocal treatment that would amount to a treaty. State A makes a 500-mile claim. By such a claim it is inviting state B both to respect the claim of A and to expect A to stay out of B's 500-mile zone. If B acts accordingly, then a tacit treaty has arisen between A and B. (Moreover, B has joined in A's claim, and thus we have the real beginnings of a customary practice and maybe even a start toward a new international consensus.) Thus, A's claim is not without legal significance; rather, it is like an offer to engage in a contract.

International law could not be law if every act or claim made by a nation could be justified. Some acts and some claims must be illegal; they must run afoul of the prevailing law. The possibility for changing international law occurs when more than one state is involved in an act or a claim. When one state acts and another state receives the action (e.g., A fishes off B's coast and B allows the fishing to go on without interference), customary practice is either created or reinforced. When one state makes a claim and another state agrees to the claim, a treaty is established; the treaty itself then has the status of the practice of states and it creates or reinforces universally valid customary rules. In sum, international law cannot be created or changed by one nation acting; in splendid isolation. International law is law between (or among) nations; a nation acting alone or making a unilateral declaration with no concurrence from other states is merely operating in the domestic legal realm.

CONCLUSION: THE IMPORTANCE OF OBJECTIVE VALIDATION

There is something of a feeling among those who are introduced to the study of international law that it is an indeterminate form of law lacking in provable content or authorized validation procedures. According to Hart, international law in the present day lacks this "rule of recognition" which, someday, will make it a "mature" legal system.^{FN57} Advocates in international law cases sometimes throw in the kitchen sink in an effort to prove their contentions; they cite anything that has ever been published if it will help their contention that a given alleged rule is in fact a rule of international law. In so doing, they are imitating the father of international law, Grotius himself, who seemed to draw upon any published source indiscriminately to prove his contentions about the content of international law. And we cannot blame Grotius or his present-day (sometimes unknowing) imitators; they are, after all, advocates.

But judges have a different obligation, and so do nations in passing upon the claims of other nations. If Iran believes that diplomatic personnel may be seized from an American embassy in Teheran if they are spies for the American government, no responsible nation in passing upon, or reacting to, that claim should allow the claim to be proved by citation of indiscriminate sources (for example, a Marxist-Leninist tract to the effect that capitalist nations always illegally spy upon other governments). Instead, reference to customary law and to the Vienna [pg107] Convention on Diplomatic Relations of 1961 FN58 amply proves that diplomats are expected to gather information about the host country and transmit it confidentially to their own country. Of course, here the rule is clear, but in other cases where the rule is not clear we should not make the mistake of concluding that, therefore, the sources of the rule are indeterminate. Not only is too much at stake (rapid escalation of competing legal claims leading to military confrontation), but also international legal theory has come a long way from the days of Grotius. The increasing attention being paid to the need for, and the procedures for, objective validation of rules of international law in a burgeoning literature of international law evidences the seriousness of the problem, the responsibility of scholars for careful scholarship in this area of legal theory, and ultimately the good possibility of generally accepted standards for that kind of objective validation.

Footnotes

*Numbers in the format pg83 etc. refer to the pagination of the original publication.

FN1. Compare the discussion of the "grudge informer problem" as an example of legal *prediction* of future enforceability in Anthony D'Amato, "The Limits of Legal Realism," *Yale Law Journal*, Vol. 87, No.2 (January 1978), pp. 506-513.

FN2. Law is quintessentially a matter of free will. Determinism (as in laws of physics, biology, etc.) is absurd in a legal context (e.g., a person who could not control his actions cannot be judged legally guilty of a crime, in any society). For philosophical expansion of these points, see Anthony Kenny, *Will, Freedom and Power* (Oxford: Blackwell, 1975), and *Freewill and Responsibility* (London: Routledge and Paul, 1978); George H.von Wright, *Norm and Action* (New York: Humanities Press, 1963). But see Onuf's chapter in this volume, the fifth section, under "Law-Making as Law-Doing," for a somewhat different view.

FN3. A fourth type of conduct-influencing message would be an offer of a reward; this is the normal component of economic exchanges. The four types seem to exhaust the range of answers to the question, "Why should I do X?" The answers are: (a) because it's right; (b) because I will punish you if you don't; (c) because it's legal; (d) because I will reward you if you do. The answers can co-exist, but the text departs from writers who insist upon a necessary connection, such as positivists who insist upon a connection between law and punishment (sanctions), or naturalists who insist upon a connection between law and morality.

FN4. For a representative naturalist viewpoint, see Lon L. Fuller, *The Morality of Law*

(New Haven: Yale University Press, 2nd ed., 1969), pp. 33-94, 152-186; for the positivist view, see H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, Knight trans., 1967). See also Samuel I. Shuman, *Legal Positivism* (Detroit: Wayne State University Press, 1963). Writers who insist that sanctions constitute the reality of international law include Wolfgang G. Friedmann, *Legal Theory* (New York: Columbia University Press, 5th ed., 1967); Hans Kelsen, *Principles of International Law*, Second Edition prepared by Robert W. Tucker (New York: Holt, Rinehart and Winston, 1966).

FN5. See Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford: Stanford University Press, 1957); Anthony A. D'Amato, "Psychological Constructs in Foreign Policy Predictions," *Journal of Conflict Resolution*, Vol. 11, No.3 (September 1967), pp. 306-309.

FN6. An immoral regime, however, might be imposed upon a conquered nation.

FN7. The rules of war obviously did act as a deterrent to many German generals and other leaders during the war even if they did not deter Hitler. There were many acquittals and more nonprosecutions at Nuremberg on the ground that the individuals involved did all in their power to comply with the relevant rules of international law. See Burns Weston, Richard A. Falk, and Anthony A. D'Amato, *International Law and World Order* (Minneapolis: West Pub., 1980), pp. 66-68, 76-80.

FN8. See Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971), pp. 218-219, and "International Law—Content and Function: A Review," *Journal of Conflict Resolution*, Vol. 11, No. 4 (December 1967), pp. 505-508.

FN9. The U. S. freeze on all Iranian assets was a direct punitive step following upon the clearly illegal taking of hostages in the U. S. Embassy in Teheran. It was phrased in terms of securing claims on Iran by the United States and its citizens. See White House Press Release, *Department of State Bulletin*, Vol. 79, No. 2033 (December 1979), p. 50. For an analysis of Iran's primary obligation, see Richard Falk, "The Iran Hostage Crisis: Easy Answers and Hard Questions," *American Journal of International Law*, Vol. 74, No.2 (April 1980), pp. 411-417.

FN10. See Plato, *The Laws*; Augustine, *The City of God*; Aquinas, *Summa Theologica*, Questions 90-92, 95-96 (1a-2ae).

FN11. Lon L. Fuller, "The Case of the Speluncean Explorers," *Harvard Law Review*, Vol. 64, No.2 (February 1949), p. 624.

FN12. Of course positivist writers will either (a) minimize such examples, or (b) concede that courts "obviously" may correct such errors. But the point is that the positivist writers lack a theory to account for the why and the when of any such corrections. Cf. Anthony D'Amato, "Towards a Reconciliation of Positivism and Naturalism: A Cybernetic Approach to a Problem of Jurisprudence," *Western Ontario Law Review*, Vol. 14 (1975), pp. 186-188.

FN13. I do not intend to denigrate positivism by this analogy to a computer. In fact, a computer is capable of rendering *exact egalitarian justice*, uninfluenced by the wealth, social prominence, or courtroom demeanor of the litigants. See Anthony D'Amato, "Can/Should Computers Replace Judges?" *Georgia Law Review*, Vol. 11, No. 5 (September 1977), pp. 1277-1301.

FN14. Charles Taylor, *The Explanation of Behaviour* (New York: Humanities Press, 1964), pp. 5-17.

FN15. Jeremy Bentham, *Of Laws in General* (London: Athlone Press, H. L. A. Hart ed., 1970), pp. 184-195.

FN16. Kelsen (fn4), pp. 70-76.

FN17. See H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, Vol. 71, No.4 (February 1958), pp.595-599.

FN18. Aquinas (fn. 10), Questions 94 art 4 (1a-2ae) ("truth or rectitude is the same for all, and is equally known by all"); Myres S. McDougal and Associates, *Studies in World Public Order* (New Haven: Yale University Press, 1960), pp. 31-36. For a critique, see D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 218-219.

FN19. See Anthony D'Amato, "Are Human Rights Good for International Business?" *Northwestern Journal of International Law and Business*, Vol. 1, (Spring 1979), p. 22.

FN20. Aquinas (fn. 10), Question 94.

FN21. The survival of animal species may have natural-law implications. St. Francis of Assisi attempted to expand the Catholic Church's concept of natural law to include animal rights, but was met with hostility and isolation by the Church establishment which did not want natural law deanthropocentricized.

FN22. See Richard A. Falk, *This Endangered Planet* (New York: Random House, 1971).

FN23. See David Mitrany, *A Working Peace System* (Chicago: Quadrangle Books, 1966), pp. 157-166.

FN24. See, e.g., McDougal (fn. 18), pp. 170, 887, 954, 1006-07. For a critique of McDougal's argument on U.S. atomic testing, see D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 215-219.

FN25. See P. E. Corbett, *Law and Society in the Relations of States* (New York: Harcourt, Brace, 1951), pp. 32-35, 210-213; cf. Julius Scone, *Legal Controls of International Conflict* (New York: Rinehart, 2nd ed., 1959), pp. 349-351.

FN26. See Abram Chayes, *The Cuban Missile Crisis* (New York: Oxford University Press, 1974), pp. 25-26.

FN27. See Kelsen-Tucker (fn. 4). See also D'Amato, "International Law—Content and Function," (fn. 8), pp. 507-509.

FN28. Of course, subsequent conduct cannot be irrelevant. If subsequent conduct contradicts the norms of law, then we may have been mistaken in our choice of norms. To see how post-validation may work in a hypothetical example, see D'Amato (fn. 1), pp. 475-477.

FN29. Contrast Erik Suy, *Les actes juridiques unilatéraux en droit international public* (Paris: Pichon, 1962), with the more careful study by Alfred P. Rubin, "The International Legal Effects of Unilateral Declarations," *American Journal of International Law*, Vol. 71, No. 1 (January 1977), pp. 1-30.

FN30. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 22-31.

FN31. Statute of the International Court of Justice, Art. 38 (1) (c).

FN32. Bentham (fn. 15), pp. 152-155, 184-195.

FN33. John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*, with an Introduction by H. L. A. Hart (London: Weidenfeld and Nicolson, 1954), pp. 30-33.

FN34. *Ibid.*, pp. 140-142. Consistently (and revealingly) Austin thought of constitutional law as also "positive morality" and not truly "law" because, like international law, he felt that constitutional law could not limit the sovereign.

FN35. Hart (fn. 4), pp. 49-76.

FN36. Cf. Fuller (fn. 4), pp. 133-145; Anthony A. D'Amato, "The Neo-Positivist Concept of International Law," *American Journal of International Law*, Vol. 59, No.2 (April 1965), pp. 321-324.

FN37. I have spelled this argument out elsewhere. See D'Amato, "On Consensus," *Canadian Yearbook of International Law*, Vol. 8 (1970), pp. 104-122.

FN38. Falk, "On the Quasi-Legislative Competence of the General Assembly," *American Journal of International Law*, Vol. 60, No.4 (October 1966), pp. 782-791.

FN39. I did not mean to suggest, as Onuf infers in his essay in this book, that consensus *replaces* custom, in D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 41-42. Less felicitous was a sentence I wrote in the *Canadian Yearbook of International Law* that consensus is "merely a definition of what we mean by the expression 'international law.'" D'Amato (fn. 37), p. 122. This sentence has been properly criticized by Onuf in the second section of his chapter in

this book. What I was trying to say in that article on this point might better be expressed as follows:

International law is what all the nations of the world believe it to be, or in other words, their "consensus." If at any time all the nations suddenly, somehow, were to manifest their belief that a new rule, X, is now a rule of international law; then X has become such a rule, again through "consensus." (To pick a wild example: a nation contacts us from a star system in another part of our galaxy, offers to enter into friendly relations with us, and all the nations of the world—whether through fear, friendship, or both—immediately express the opinion that that other-world nation shall have certain traditional rights and privileges under earth-bound international law; then that new situation would have been accomplished through "consensus" even without any practice or actions on the part of states.) But to say this is not to say that consensus is a *procedure* for deriving new rules; rather, it is a way of saying that a new rule is in fact a rule. There is admittedly a phenomenological aspect to this sort of reasoning, which is why I wrote in an earlier article, "International law, in short, is phenomenological at the national-perception level. Only when we begin to get at the subject from such an approach can the claims of scientific accuracy, which at present are used for propagandistic purposes, become truly persuasive." D'Amato, "International Law-Content and Function," (fn.8), p. 510.

FN40. See Kelsen (fn. 4), p. 325.

FN41. Nevertheless, Akehurst feels that a similar rather silly example (Japan adopting the Western Calendar in 1872), standing alone, invalidates my entire thesis on articulation as the qualitative element in custom. See Michael Akehurst, "Custom as a Source of International Law," *British Year Book of International Law*, Vol. 47 (1974-1975), p. 36.

FN42. See D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 47-102.

FN43. The second section of his chapter, under "Traditional Sources."

FN44. See Richard A. Falk, "International Law and the United States Role in the Vietnam War," in Falk, ed., *The Vietnam War and International Law*, Vol. 1 (Princeton: Princeton University Press, 1968), pp. 366-368.

FN45. On a purely impressionistic basis, I would guess that over 90% of the rules of international law owe their origin to treaties. For a historical statement to this effect, see Georg Schwarzenberger, *A Manual of International Law* (London: Stevens, 4th ed., 1960), p. 28, and *The Frontiers of International Law* (London: Stevens, 1962). Armchair perusal of the classics in international law, especially the so-called positivist authors such as Zouche, Bynkershoek, Moser, Vattel, and Wolff, will reveal the tremendous extent to which what they claim were rules of international law were in fact rules found in or derived from provisions in treaties.

FN46. The argument, with reference to cases and other evidences of state practices, is spelled out in D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 103-166.

FN47. This effect given to rules in treaties is *independent* of the actual wishes of the parties thereto. In other words, it is irrelevant whether the parties to a treaty intend nonparties to be bound. For the effect of rules in treaties upon nonparties is a function of the way the international community as a whole views rules in treaties as generators of custom, and not whether the particular parties to a treaty have "legislative" intent. An entirely different question is whether the rule in a treaty, on its face, objectively manifests universal application. On this particular point, see D'Amato, "Manifest Intent and the Generation by Treaty of Customary Rules of International Law," *American Journal of International Law*, Vol. 64, No.5 (October 1970), pp. 892-902; N. G. Onuf, "Further Thoughts on a New Source of International Law: Professor D'Amato's Manifest Intent," *American Journal of International Law*, Vol. 65, No.5 (October 1971), pp. 774-781.

A leading recent article by Akehurst criticizes my theory by the argument that if the parties to a treaty do not intend the rules in the treaty to have customary law-making effect, then the rules do not have that effect. See Akehurst (fn. 41), p. 43. But how would Akehurst *know* whether the parties to a treaty have such a restrictive view of the ambit of the provisions upon which they have agreed? He neither cites evidence of the parties' intent with respect to *any* treaty, nor does he indicate where one would look for such evidence. But even assuming he were to find convincing evidence of what the parties intend, what really "counts" is what the international community of states decides to do with respect to the rules in the treaty. Analogously, would Dr. Akehurst contend that if states A and B interact in the form of a practice that is recognized by the community of states as generating a customary rule of law, what is important is whether states A and B "intend" that such practice be given customary-law effect? But practice is *no different* from signing a treaty. A treaty is in effect a concretization of practice. For an expansion of this point see D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 149-166. Cf. R. Y. Jennings, "Treaties as Legislation," in Gabriel M. Wilner, ed., *Jus et Societas* (The Hague: Nijhoff, 1979), pp. 166-168.

FN48. Dworkin (fn. 30), pp. 22-31.

FN49. In a little-known essay. See Quincy Wright, "The New Law of War and Neutrality," in *Varia Juris Gentium* (Leiden: Sijthoff, 1959) p. 412.

FN50. McDougal (fn. 18), p. 778.

FN51. Proclamation With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945, *Federal Register*, Vol. 10, p. 12303.

52. *Ibid.*

FN53. See Zdenek J. Slouka, *International Custom and the Continental Shelf* (The Hague: 1968).

FN54. *Ibid.*, pp. 146-152.

FN55. See D'Amato, *The Concept of Custom in International Law* (fn. 8), pp. 98-102, 195-197.

FN56. Cf. fn. 29 above.

FN57. Hart (fn. 4), pp. 208-231; cf. fn. 36 above.

FN58. Vienna Convention on Diplomatic Relations of April 18, 1961, *United Nations Treaty Series*, Vol. 500 (1964), p. 98.